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IN THE

Supreme Court of the United States

FILED
JAN 16 1971

October Term, 1970

No. 1246

IVERNE R. CARTER, Warden, *et al.*,

Petitioners,

vs.

LUCILLE MILLER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

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IVERNE R. CARTER, Warden, *et al.*,

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LUCILLE MILLER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners Iverne R. Carter, Warden, *et al.*, hereinafter referred to as petitioners, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in Lucille Miller v. Iverne R. Carter, Warden, *et al.*, on October 9, 1970, case number 24365.

Opinions Below

The opinion of the Court of Appeals is as yet unreported and is appended hereto as Appendix A. The opinion of the United States District Court for the Central District of California is unreported and is appended hereto as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit in *Miller v. Carter* was entered on October 9, 1970. A motion for rehearing in banc

was denied on December 18, 1970. Jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1254(1). Petitioners asserted below and assert here that in respondent's state court trial defense counsel deliberately by-passed established state procedure and deliberately waived the constitutional issue of error in the introduction of the testimony of an undercover agent, and that the issues before the District Court on habeas corpus had already been adjudicated by the United States Supreme Court and were not open for reconsideration. The Ninth Circuit Court of Appeals has erroneously distinguished other Ninth Circuit cases on the issue of waiver and prior adjudication by the Supreme Court and misconstrued section 2244(c) of Title 28 United States Code and thereby created a conflict of decisions and the necessity to decide an important question of federal law not previously settled by this Honorable Court.

Questions Presented

1. Is 28 U.S.C. section 2244(c) constitutional in providing for the application of the unqualified doctrine of *res judicata* to an application for habeas corpus?

2. Is the dismissal of a writ of certiorari as improvidently granted after briefs and oral argument in practical effect an adjudication that no substantial federal question is presented which is *res judicata* in the lower federal courts on habeas corpus or at least sufficient grounds to deny the writ in the absence of a new

material and controlling fact which reasonable diligence could not have previously divulged?

3. Is the affirmative decision of defense counsel to forego an objection to the testimony of an undercover agent for the strategic purpose of introducing her testimony in favor of the defense a waiver of any claim of constitutional error which will preclude the assertion of such a claim on habeas corpus in the federal courts?

Constitution and Statutory Provisions Involved

1. This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves 28 U.S.C., §2244(c):

> "(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

Statement of the Case

Respondent Lucille Miller was indicted for the murder of her husband Gordon Eugene Miller on October 20, 1964. She had been arrested on October 9, 1964, the morning after her drugged husband had been burned alive in the family Volkswagen which she had been driving. She was charged with murder in violation of section 187 of the Penal Code of the State of California, and was found guilty of that charge by a jury with a finding of murder in the first degree. The motion for a new trial was denied and she was sentenced to life imprisonment.

On appeal, the California Fourth District Court of Appeal, by a unanimous decision affirmed the judgment of the trial court. Hearing in the Supreme Court of the State of California was denied on December 14, 1966. The opinion as later modified and the order of the Supreme Court of California denying a hearing are reported in 245 Cal. App. 2d 112, 53 Cal. Rptr. 720.

A timely petition for writ of certiorari was filed in the United States Supreme Court. A response was requested of petitioners. After submission of the response, a second response was requested of petitioners. After submission of the final response, the petition for certiorari was granted on December 4, 1967, in number 1383 O.T. 1966. Briefs having been filed and after oral argument, the United States Supreme Court on June 17, 1968, in a per curiam opinion dismissed the writ of certiorari as improvidently granted.

On September 3, 1968, respondent filed a petition for writ of habeas corpus in the United States District Court, Central District of California. On September

6, 1968, the United States District Court ordered a return to petition for writ of habeas corpus.

On March 24, 1969, the United States District Court after oral argument issued an order denying the petition for writ of habeas corpus and dismissing the action. On April 16, 1969, respondent filed a notice of appeal. Respondent on April 18, 1969, filed an application for a certificate of probable cause in the District Court. On April 23, 1969, the District Court denied the certificate of probable cause. On April 30, 1969, respondent filed an application for a certificate of probable cause in the United States Court of Appeals for the Ninth Circuit. On May 29, 1969, that court granted a certificate of probable cause. On October 9, 1970, after briefs and oral argument, the United States Court of Appeals for the Ninth Circuit in a decision from which Circuit Judge Feak dissented, reversed and remanded the case for further proceedings. On December 18, 1970, the United States Court of Appeals for the Ninth Circuit denied petitioners' motion for a rehearing in banc.

Statement of Facts Pertinent to the Questions Presented

On October 9, 1964, the day of respondent's arrest, a woman by the name of Peggy Fisk was booked into the County Jail as a prisoner. However, she was employed by San Bernardino County to work undercover and pretend to be a prisoner. Her instructions were only to listen. She was placed in respondent's cell and became acquainted with her. Respondent talked to her about herself, her reason for being in jail, her husband, and her domestic problems. [Rep. Tr. pp. 1098-99, 1102, 1112; Appendix pp. 54-55, 58, 66.] Fisk did not tell respondent that she was a law en-

forcement agent, but did tell her that she should discuss these things with her attorney. She did not tell respondent that she had a right to have an attorney present when she talked to Fisk. However, the record is devoid of a single instance in which Fisk asked respondent a question or said anything to her which induced any of the statements introduced into evidence. [Rep. Tr. pp. 1098-1114; Appendix pp. 54-68.] Respondent told Fisk that she and her husband had filed for divorce at one time but had reconciled before his death. She said that she had not loved her husband but that she had respected him. She said that she had always loved Mr. Hayton and still loved him. She said that as soon as this mess was over that she planned to take her daughter Debbie and the two boys away to Europe with the insurance money. She said that she would receive over $100,000 in insurance because of the accidental death. [Rep. Tr. pp. 1100-1101; Appendix pp. 56-57.]

When the undercover agent was called to the stand as a witness for the prosecution, respondent's counsel raised only an objection that he had not been furnished with the witness's address as promised. At the suggestion of the court, proceedings were then continued in the Judge's chambers outside the hearing of the jury. [Rep. Tr. pp. 1007-08; Appendix pp. 41-42.] Once in chambers counsel for respondent said [Rep. Tr. p. 1009; Appendix pp. 42-43]:

> ". . . I am going to *represent* to the Court also that any testimony of this witness concerning any statement made by my client would be in violation of the rule in the Dorado case.[1] She was an under-

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[1](Footnote ours.) *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, had originally been decided on August 31, 1964 but a rehearing had been granted on September 24, 1964.

cover agent, and never informed my client of her capacity. Never advised my client of my client's right to remain silent.

"I previously had served on the District Attorney and the Sheriff of this County a demand to be present at any interrogation of my client by any agent of the Sheriff's office. So, any testimony of this witness concerning any statement made by my client not only violates the rule in the Dorado case, but the rule in People v. Sharer as well, and also the rule in Massiah versus United States." (Emphasis added.)

The district attorney offered counsel for the defense the opportunity to interview the witness, and counsel later after adjournment for the day took advantage of that opportunity. [Rep. Tr. pp. 1009-10; Appendix pp. 42-43.] The district attorney stated [Rep. Tr. pp. 1010-12; Appendix pp. 42-45]:

"Now, so far as the rest of it, the right under the Dorado case and Massiah case and the rest of them, the right of a witness, a defendant to remain silent. It is a defendant's right, not an attorney's. The defendant may waive this right, providing the defendant does so intelligently, knowingly and understandingly. This is the gist of all of those cases.

"Now, this particular witness did not interrogate his client. She specifically told her, the testimony will be that she specifically advised Mrs. Miller not to talk. Her testimony will be that Mrs. Miller told her that her attorneys had advised her that there probably would be somebody in jail trying to pump her, and Miss Fisk, as part of her

technique, I suppose, told Mrs. Miller; 'Well you shouldn't talk to anybody except your attorneys and the sheriff,' and, of course, she never did talk to the Sheriff, so that is beside the point.

"She stayed up in the jail with her for about a week and listened and when Mrs. Miller talked to her, on two or three occasions, she told her 'Don't tell me about it.' But Mrs. Miller insisted on telling her. It is Mrs. Miller's right and privilege to talk, if she wants to.

"Nobody pumped her. Nobody interrogated her. No attempt was made to force her to talk at all. She did talk, and some statements which she made which are material to this case, we will desire to have her testify about them, and statements in the report which Mr. Foley saw last December."

The trial court suggested that the prosecution withdraw the witness and give counsel an opportunity to talk to her, but that on the other objection she would have to be sworn in and at least testify to the preliminary questions and have an objection made at the proper time. [Rep. Tr. pp. 1013-15, Appendix pp. 45-47.]

The following morning the undercover agent was the first witness. She was called to the witness stand and asked preliminary questions as to her occupation and the fact of her undercover placement in respondent's jail cell. The district attorney asked her if respondent had talked about herself, the reason she was in jail, about her husband, and about any domestic

problems she had had. At that point respondent's counsel asked to take the witness on *voir dire*, at which time he asked if she had informed the respondent that she should discuss this with her attorney. Counsel for respondent closed his *voir dire* examination and the direct examination was resumed. *Counsel for respondent did not interpose any objection whatsoever to the testimony of the undercover agent. Nor did he attempt to lay any foundation that there had been a process of interrogation that lent itself to eliciting incriminating statements.* He was entirely cognizant of the *Massiah*, *Escobedo*, and *Dorado* decisions for he had raised the point in chambers before the undercover agent was called as a witness. He took the witness on *voir dire* and did not attempt to establish any facts concerning a process of interrogation on the part of the undercover agent. In fact, he later established with the two below exceptions, that the undercover agent was specifically instructed only to listen to respondent and that she had followed those instructions. [Rep. Tr. pp. 1102, 1112; Appendix pp. 58, 66.] Later, in cross-examination, counsel for the first time developed that the undercover agent had been instructed by the Sheriff to bring a newspaper article and two fictitious conversations to the attention of appellant which might have provoked comment by her; however, it was never shown that any incriminating statements whatsoever were provoked by these matters. Certainly, any comments of appellant that might have been provoked by these matters were not introduced into evi-

dence by the prosecution nor were they introduced by the defense.

Counsel for respondent made no request that the trial court take evidence outside the presence of the jury on the issue of whether the statements made by respondent to the undercover agent were voluntary and were not obtained in violation of respondent's right to counsel and against self-incrimination. Counsel for respondent made no attempt to have the testimony of the undercover agent stricken. The great bulk of her testimony was favorable to the defense. [Rep. Tr. pp. 1101-1112; Appendix pp. 57-67.]

Before the California District Court of Appeal, the contention was raised that the testimony of the undercover agent was erroneously admitted despite the absence of an objection on the part of counsel. The California District Court of Appeal held that the failure to object was a deliberate waiver of any constitutional error for strategic purposes and that the failure to object precluded raising the matter on appeal. *People v. Miller,* 245 Cal. App. 2d 112, 143-44, 53 Cal. Rptr. 720. After a hearing was denied in the California Supreme Court, this precise question was raised in a petition for writ of certiorari which was granted. The precise issue was briefed and orally argued before the United States Supreme Court on March 26, 1968. On June 17, 1968, the United States Supreme Court dismissed the writ of certiorari as improvidently granted. The dissenting opinion of Mr. Justice Marshall clearly indicates that the issues considered by the United

States Supreme Court before the writ was dismissed were (1) whether an objection to constitutional error was waived and (2) the Constitutional questions 392 U.S. 616 (1968).

Respondent filed a petition for writ of habeas corpus in the United States District Court Central District of California and raised the identical issue of constitutional error in the admission of the undercover agent's testimony. A nonevidentiary hearing was held in which respondent did not attempt to plead or prove the existence of any material and controlling fact which did not appear in the record of the proceedings in the United States Supreme Court. The District Court found both that the United States Supreme Court in dismissing the writ as improvidently granted had in practical effect adjudicated the issue of waiver of the constitutional objection and found no substantial federal question presented by the claim of constitutional error as evidenced by the dissenting opinion of Mr. Justice Marshall. (Order denying petition for writ of habeas corpus and dismissing action, pp. 6-7.) The District Court first found, however, that there had truly been a waiver of the constitutional objection under *Fay v. Noia,* 372 U.S. 391 (1963).

REASONS FOR GRANTING THE WRIT

I

Section 2244(c) of 28 U.S.C. in Providing for Unqualified Res Judicata on Habeas Corpus After Supreme Court Adjudication Is Constitutional

The District Court below held that respondent had deliberately waived any claim of denial of her constitutional rights when counsel at the trial, in order to carry out his defense strategy, chose to withhold any objection to the testimony of an undercover agent placed in respondent's jail cell prior to her indictment. The District Court relied upon *Fay v. Noia, supra*, 372 U.S. 391, 439 (1963) and *Curry v. Wilson*, 405 F. 2d 110 (9th Cir. 1968). But, in addition, the District Court relying upon *Duncan v. Carter*, 299 F. 2d 179 (9th Cir. 1962; *Cert. den.* 370 U.S. 952) held that petitioner's claim did not justify the granting of any relief in the action because: (1) The Supreme Court, after first granting certiorari to consider whether the admission of the undercover agent's testimony constituted a violation of the right to a fair trial subsequently dismissed the petition for certiorari, (2) The Supreme Court had considered the same constitutional questions raised by petitioner on habeas corpus before the District Court which was in practical effect an adjudication and binding upon the District Court as is any adjudication of a question of law by the Supreme Court in the absence of newly discovered facts. This rule has since the *Duncan* case been codified in section 2244(c) of 28 U.S.C. The District Court was fully advised as to all of the factual and legal matters presented to the Supreme Court by the record and briefs before the Supreme Court as well as

the majority decision to dismiss the writ as improvidently granted and the dissenting opinion of Mr. Justice Marshall joined in by the Chief Justice and two other associate justices of the Supreme Court which fully sets forth the questions considered by the Supreme Court after briefs and oral argument. It is readily apparent that the waiver issue is the likely one which prompted the dismissal of the writs without deciding the merits of the constitutional questions. Certainly the failure of the record to clearly reveal a constitutional violation is another possibility.

The District Court, therefore, was justified in the denial of the writ of habeas corpus. First it was proper as a matter of discretion once the case had been dismissed by the Supreme Court on the identical issues, it having been conceded that the issues were identical, and that no new matter had been presented. A District Court may take into consideration the dismissal after briefs and oral argument of a writ of certiorari since a denial of certiorari may be so considered. *Brown v. Allen,* 344 U.S. 443, 456-57 (1953). Second, it was proper as a matter of *res judicata* under *Duncan* and section 2244(c).

The Court of Appeals disagreed, holding that there was no waiver and that a dismissal of a writ of certiorari is not any different than a denial of certiorari which is not an adjudication upon which the District Court could rely in a denial of habeas corpus under section 2244(c) or otherwise. We submit that the District Court was correct in its interpretation of both *Curry* and *Duncan* which was the precursor of section 2244(c). Furthermore, we submit that the District Court had discretion to dismiss the writ of habeas corpus on the basis that the identical issues had been pre-

sented to the Supreme Court even under the theory that the dismissal was the equivalent of a denial of certiorari when it was obvious that no newly discovered facts had been presented. In any event, the District Court's decision is supported by section 2244 (c).

Section 2244(c) was enacted to reduce the number of frivolous repetitious petitions for habeas corpus relief which had become an intolerable burden upon the federal judiciary. All of the subsections of section 2244 are based upon prior Supreme Court decisions, particularly *Salinger v. Loisel*, 265 U.S. 224, 230 (1924), *Sanders v. United States*, 373 U.S. 1, 11-12 (1963), concurring opinion of Frankfurter in *Brown v. Allen*, 344 U.S. at pp. 508-10. We submit that there is ample justification and precedent for subsection (c) as well. Congress has provided the federal judiciary with its habeas corpus power and may provide for the application of the doctrine of *res judicata* to habeas corpus unqualified by judicial discretion. It is appropriate for an adjudication of the Supreme Court to be conclusive on lower federal courts under the doctrine that judgments of the Supreme Court are the law of the land and by reason of the supervisory power of the Supreme Court over the lower federal courts.

A. The Power of the Federal Judiciary to Grant the Writ of Habeas Corpus Comes From the Congress and Congress May Prescribe the Limits of That Power

Article I, section 9, clause 2 of the Constitution provides:

> "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The Constitution by that provision has guaranteed the writ of habeas corpus unless lawfully suspended which means there is no right to the writ at all in times of rebellion or invasion if the public safety requires suspension of the writ. Congress has the power, however, to characterize the scope of the writ by statute and has clearly done so from the beginning. *Johnson v. Zerbst*, 304 U.S. 458, 465-66 (1938), *Walker v. Johnson*, 312 U.S. 275, 285 (1941). The decisions of the Supreme Court have always recognized that the power to grant habeas corpus is derived from Congress and controlled by it. *Harris v. Nelson*, 394 U.S. 286, 298 (1969); *Peyton v. Rowe*, 391 U.S. 54, 58, 64-65 (1968), *Fay v. Noia*, *supra*, 372 U.S. 391, 398, 401, 406, 409-10, 413, 415, 417, 420, 442, 444 (1963). Mr. Justice Clark dissenting in *Fay v. Noia* at pp. 447-48, Mr. Justice Harlan dissenting in *Fay v. Noia* at pp. 449 and 452; *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963); *Brown v. Allen*, 344 U.S. 443, 460-61 (1953); *Ahrens v. Clark*, 335 U.S. 188, 190-93 (1948); *In re Burrus*, 136 U.S 586, 589-91 (1889); *Rowe v. Peyton*, 383 F. 2d 709, 716 (4th Cir. 1967); *Stirone v. Markley*, 345 F. 2d 473 (7th Cir. 1965); *United States v. Hendricks*, 213 F. 2d 922, 929 (3rd Cir. 1954); *Lockhart v. United States*, 136 F. 2d 122, 125 (6th Cir. 1943).

B. Congress May Provide for Strict Res Adjudicata in Habeas Corpus

It has been held by the Supreme Court that *res judicata* is not applicable to habeas corpus as a rule of practice in the common law, however, the basis for that rule has been recognized to be the absence of a right of appeal from a denial of habeas corpus. *Salinger v. Loisel*, *supra*, 265 U.S. 224, 230-31 (1924).

The court in that case went on to outline rules of qualified *res judicata* which were later codified in section 2244 of 28 United States Code. The court recognized that the inapplicability of *res judicata* could be modified by statute. Yet, relying upon *Salinger v. Loisel,* the Supreme Court in *Darr v. Burford,* 339 U.S. 200, 214-15 (1950) held:

> ". . . All the authorities agree that *res judicata* does not apply to applications for habeas corpus. The courts must be kept open to guard against injustice through judicial error. Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner. On that application, the court may require a showing of the record and action on prior applications, and may decline to examine further into the merits because they have already been decided against the petitioner. Thus there is avoided abuse of the writ by repeated attempts to secure a hearing on frivolous grounds, and repeated adjudications of the same issues by courts of coordinate powers.
>
> "In this way the record on certiorari in this Court is brought to the attention of the trial court. . . . If this Court has doubts concerning the basis of state court judgments, the matter may be handled as in Burke v. Georgia, 380 U.S. 941, with an express direction that the petitioner may proceed in the federal district court without prejudice from the denial of his petition for certiorari. If the District Court feels that error may have occurred, it has power to examine the application to see if circumstances exist to justify it in holding a hearing on the merits. Such freedom of action protects the Great Writ without trivializing it.

> "But it is argued that if the denial of certiorari mean nothing, the result of our decision is to force a 'meaningless step.' We do not agree. Though our denial of certiorari carry no weight in a subsequent federal habeas corpus proceeding, we think a petition for certiorari should nevertheless be made before an application may be filed in another federal court by a state prisoner. . . ."

In his dissenting opinion at page 224 Justice Frankfurter stated that even after an *adjudication* by the Supreme Court a District Court could grant the writ because the Supreme Court adjudication would not be *res judicata.*

Next, in *Fay v. Noia, supra,* at p. 423, the inapplicability of *res judicata* to habeas corpus was laid to the voidness of the judgments attacked by habeas corpus and on the ground that there must always be access to the federal courts to protect constitutional rights. Finally, in *Sanders v. United States, supra,* at pages 8, 11-12, the inapplicability of *res judicata* to habeas corpus was declared to be inherent in the very role and function of the writ and it was suggested that if Congress enacted laws to provide for *res judicata* it might be unconstitutional referring back to *Fay v. Noia, supra,* at p. 406.

It is abundantly clear then, that this Honorable Court has left open until now the question of the power of Congress to provide for the applicability of *res judicata* to habeas corpus. Congress has done so, but only with respect to prior Supreme Court adjudication as was mentioned by Justice Frankfurter. We submit that Congress has the power to incorporate into habeas corpus the doctrine of *res judicata* because habeas cor-

pus is statutory. The only sound reason for the past inapplicability of *res judicata* was the absence of the right to appeal from the denial of the writ which Congress has now provided. Attacks upon void judgments have a ready avenue to final determination through the federal court system and need not be repeatedly entertained. We submit that a final decision on habeas corpus should be *res judicata*. The reasons for such an approach to modernize habeas corpus are cogently set forth in Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?* 40 Calif. L. Rev., 335 (1952).

C. Supreme Court Adjudications Should Be Res Judicata in Habeas Corpus by Reason of the Final Judicial Power and Supervisory Power of That Court

The Supreme Court has been given the power to declare the law of the land under the Constitution. *U.S. v. Montgomery Bd. of Educ.*, 395 U.S. 225, 237 (1969); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Brown v. Allen*, 344 U.S. 443, 508-10 (1953). The Supreme Court has the power to determine the finality to attach to its judgments. *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957). It is the court of ultimate review of the standards formulated and applied by the federal courts. *Lopez v. United States*, 373 U.S. 427 (1963). The Supreme Court alone is the final arbiter of a state prisoner's claim that he had been deprived of his rights under the federal constitution. *Dixon v. Duffy*, 344 U.S. 143, 145-46 (1952). Finally, the Supreme Court has supervisory power over the administration of criminal justice in the federal courts. *McCarthy v. United States*, 394 U.S. 459, 464 (1969); *McNabb v. United States*, 318 U.S. 332, 341, 347 (1943).

In light of these principles it is only fitting that a final adjudication of the Supreme Court on a matter of law should be conclusive on the lower federal courts in habeas corpus in the absence of the particular exceptional circumstances set forth in section 2244(c).

II

The Dismissal of Certiorari Is in Effect an Adjudication for the Purpose of Res Judicata in the Event of Subsequent Habeas Corpus Proceedings in the Lower Federal Court

It is conceded that respondent on habeas corpus raised the identical issue in the District Court that she had presented to the United States Supreme Court and that no newly discovered facts pertaining to the waiver issue of the constitutional issues were alleged in the habeas corpus proceeding. The issues were fully briefed, orally argued, and the record examined before the United States Supreme Court. On June 17, 1968, that court entered a *per curiam* opinion, reading as following: "The writ is dismissed as improvidently granted." A lengthy dissent was written by Mr. Justice Marshall indicating that the merits of the federal constitutional question were considered by the majority of the court and rejected on one or more of three grounds: (1) that there was no constitutional error in respondent's trial; (2) that whether or not there was error, objection to it was waived; or (3) that the error was harmless. *Miller v. California,* 392 U.S. 616 (1968). The District Court held that the Supreme Court did indeed consider the constitutional issues and that the District Court was bound thereby as in the case of any adjudication of a question of the Supreme Court in the absence of newly discovered facts which would

cast the legal questions in a new light. The Court of Appeal held that there was no adjudication of the issues of the constitutional and procedural questions involved in the appeal by the United States Supreme Court and likened the dismissal of a writ of certiorari after briefs and oral argument to the denial of a writ of certiorari.

Section 2244(c) of Title 28, United States Code, provides:

> "In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence."

In *Duncan v. Carter, supra,* 299 F. 2d 179 (9th Cir. 1962), the state prisoner claimed that she was deprived of due process of law due to adverse publicity prior to and perhaps during her trial. The United States Supreme Court had granted a petition for a writ

of certiorari as to the publicity issue, examined the state court record pertinent thereto, considered briefs and heard oral argument, and then had stated in a *per curiam* opinion:

> " 'After hearing oral argument and on due examination of the records, we conclude that the totality of circumstances disclosed fails to support the substantial due process issue tendered in the petitions for certiorari, and so we dismiss the writs.' " *Duncan v. Carter, supra* at 181.

The dismissal of the writ of certiorari was in the case of *Baldonado v. California,* 366 U.S. 417 (1961). The court in *Duncan v. Carter* held that although the action taken was to dismiss the writ rather than affirm the state judgment, it was in practical effect an adjudication that the facts presented did not support the claim of deprivation of a constitutional right. The court said:

> "*Res judicata* does not apply to applications for habeas corpus and appellant was entitled to seek such relief in a federal district court despite this Supreme Court pronouncement. Nevertheless, where a question of law is actually adjudicated by the Supreme Court, and where no newly-discovered facts are alleged which would cast that legal question in a new light a district or circuit judge is bound thereby, as in the case of any other adjudication of a question of law by the Supreme Court.
>
> "In her application for a writ of habeas corpus, appellant did not allege newly-discovered facts pertaining to adverse publicity before and during the trial. In effect, then, she was presenting to

> the district court the same question of law which had been resolved against her by the United States Supreme Court. The district court correctly determined that under the circumstances the contention was not open for reconsideration by the district court. It therefore did not err in refusing to accept evidence or to examine the state court record as to the publicity issue." (Emphasis by the court, footnote omitted.) *Duncan v. Carter, supra* at p. 182.

There is no question but that other considerations than the merits can result in the denial of a writ of certiorari, but when questions on the merits have been found deserving of the writ, the only fair and reasonable grounds for dismissing the writ would be that the merits as presented cannot justify relief. Otherwise, would it not be a travesty of justice to dismiss a writ of certiorari after briefs and oral argument and have it mean nothing at all. The dismissal of a writ of certiorari should at the very least connote what was expressed in *Baldonado v. California, supra,* 366 U.S. 417 (1961).

In this sense, there can be no true distinction between our case and *Duncan v. Carter, supra,* 299 F. 2d 179 (9th Cir. 1962) as implicit in the dismissal of a writ of certiorari after briefs and oral argument, is the adjudication that the issues are either not reachable by reason of a failure to preserve the question below, or are not supported by the record. This is particularly true in our case in view of Justice Marshall's dissent wherein the issues were treated on the merits.

This conclusion is fortified by the legislative history of section 2244, Title 28, United States Code, noted by

the Ninth Circuit Court of Appeals in its opinion wherein it is stated that the section means that the United States Supreme Court's rulings are final on issues considered by that court except: "*mere* denials of writs of certiorari." (Emphasis added.) It is to be noted that the dismissal of writs of certiorari is not uncommon so that the absence of a reference to the dismissal of writs of certiorari should indicate that they are not indistinguishable from *mere* denials. *See:* Legislative History and Senate Report, 1797, reported in U.S.C. Congressional and Administrative News, Volume III, page 3663 (1966).

In the instant case, we submit that although the majority of the United States Supreme Court chose not to write opinions when the writ was dismissed, probably because of a diversity of affirming theories as outlined above, there was an adjudication on one or more of the above theories as presented to that court by briefs and in oral argument and the district court was bound thereby and did not need to examine the state records, take evidence, or grant a writ of habeas corpus. 28 U.S.C. § 2244(c). The Supreme Court actually ruled that there was no basis for the writ of certiorari. This is to be distinguished from the ordinary mere denial of the writ which might be on the basis that the court was not interested in the question or did not deem it of sufficient significance to warrant granting certiorari.

In prior decisions of the United States Supreme Court, the meaning of the denial of certiorari has been touched upon in particular as to its application to the doctrine of *res judicata* in subsequent habeas corpus proceedings in the lower federal courts. However, no decision by the United States Supreme Court has

touched upon the meaning of a dismissal of a writ of certiorari as improvidently granted and its application to the doctrine of *res judicata* as applied to subsequent habeas corpus proceedings in the lower federal courts. Some grasp of the significance of the dismissal of a writ of certiorari can be gained from recent cases in which the writ has been dismissed as improvidently granted and a few examples will be discussed below.

In *Darr v. Burford*, 399 U.S. 200, 214 (1950), the Supreme Court declined to pass upon the meaning of the denial of certiorari and said:

> "There should be no controversy over whether the refusal of certiorari 'would serv. the purpose of an adjudication on the merits.' All the authorities agree that *res judicata* does not apply to applications for habeas corpus. . . ."

Now the doctrine of *res judicata* in qualified form is applicable to habeas corpus under section 2244. It was held in *Darr v. Burford* that though a refusal of certiorari have no effect upon a later application for federal habeas corpus, a petition for certiorari in the United States Supreme Court ordinarily should be required. *Darr v. Burford, supra*, 339 U.S. at p. 216. This holding was overruled in *Fay v. Noia*, 372 U.S. 391, 435 (1963).

Some insight into the meaning of the denial of certiorari was provided in the dissenting opinion of Frankfurter J. in *Darr v. Burford, supra*, 399 U.S. at pp. 226-27:

> "7. The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again and again and again that such a denial has no legal significance

whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else. The State court's judgment is left undisturbed without any legal reinforcement whatever of the views which the State court expressed. Counsel at the bar have frequently been stopped for drawing comfort out of such a denial and the Court's opinions have indicated impatience with failure to recognize that the only thing that such a denial imports is that there were not four members of the Court who deemed it desirable, for their respective reasons, to review a decision of the lower court. Even before the Judiciary Act of 1925 so vastly extended this Court's certiorari jurisdiction, the Court said: 'The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.' United States v. Carver, 260 U. S. 482, 490. This notice of impatience has been sounded repeatedly.

"The wholly negative meaning of a denial of certiorari is not so merely because we have said it. We have said it because it must be so unless the whole conception of certiorari in relation to the business of this Court is to be radically transformed. Such a revolutionary change cannot justifiably be taken in relation to one large group of cases without drastic revision of the Court's treatment of such cases, with far-reaching consequences to the business of the Court and its proper discharge.

"Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons

which precludes the implication that were the case here the merits would go against the petitioner. Petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see; or that the constitutional issue was entangled with nonconstitutional issues that raised doubt whether the constitutional issue could be effectively isolated; or for various other reasons not relating to the merits. Divergent and contradictory reasons often operate as to the same petition and lead to a common vote of denial. The want of explanations for denials of certiorari is in part due to the fact that a collective reason frequently could not be given. . . ."

In *Brown v. Allen*, 344 U.S. 443, 456 (1953) it was held by a minority of the court that a District Court could give consideration to the record of the prior certiorari in the Supreme Court and such weight to the denial of certiorari as the District Court felt the record justified. The minority itself felt that although the denial of certiorari imported no expression of opinion upon the merits of the case so that it had no precedential value, nevertheless, where the record distinctly presented a substantial federal constitutional question brought to the Supreme Court by certiorari and denied, court's dealings with future applications for habeas corpus on the same issues presented in earlier applications for writ of certiorari should have

the power to take the denial into consideration in determining their action. In his concurring opinion Mr. Justice Frankfurter, although disagreeing with the effect of the denial of certiorari, stated at page 489:

> ". . . Of course, when the reasons are given [for the denial of certiorari], the decision to deny will have the effect indicated by the reasons stated. . . ."

In his concurring opinion in *Brown v. Allen, supra,* at pp. 542-44, Mr. Justice Jackson stated:

> "True, neither those outside of the Court, nor on many occasions those inside of it, know just what reasons led six Justices to withhold consent to a certiorari. But all know that a majority, larger than can be mustered for a good many dicisions, has found reason for not reviewing the case here. Because no one knows all that a denial means, does it mean that it means nothing? Perhaps the profession could accept denial as meaningless before the custom was introduced of noting dissents from them. Lawyers and lower judges will not readily believe that Justices of this Court are taking the trouble to signal a meaningless division of opinion about a meaningless act. It is just one of the facts of life that today every lower court does attach importance to denials and to presence or absence of dissents from denials, as judicial opinions and lawyers' arguments show.
>
> "The fatal sentence that in real life writes *finis* to many causes cannot in legal theory be a complete blank. I can see order in the confusion as to its meaning only by distinguishing its significance under the doctrine of *stare decisis* from

its effect under the doctrine of *res judicata*. I agree that, as *stare decisis* denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of *res judicata* as applied either by state or federal courts. A civil or criminal judgment usually becomes *res judicata* in the sense that it is binding and conclusive even if new facts are discovered and even if a new theory of law were thought up, except for some provision for granting a new trial, which usually is discretionary with the trial court and limited in time.

"It is sometimes said that *res judicata* has no application whatever in habeas corpus cases and surely it does not apply with all of its conventional severity. Habeas corpus differs from the ordinary judgment in that, although an adjudication has become final, the application is renewable, at least if new evidence and material is discovered or if, perhaps as the result of a new decision, a new law becomes applicable to the case. This is quite proper so long as its issues relate to jurisdiction. But call it *res judicata* or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence.

"Nor is there any good reason why an identical contention rejected by a higher court should be reviewed on the same facts in a lower one."

It can be seen that there is no unanimity of opinion as to the meaning of the denial of certiorari, particularly in the presence of language accompanying the denial which would indicate the reasons for the denial. Be that as it may, mere denials of certiorari are not *res judicata* under section 2244. It is in this sense that the word "mere" has significance, perhaps the word "mere" has reference to naked denials without accompanying explanations or dissents. We submit that a denial of certiorari can have the meaning that the Supreme Court wishes to give it in any particular case. In any event there is a marked distinction between the denial of certiorari which can be based upon factors unrelated to the merits or the record, and a dismissal of certiorari of a case already found worthy to be reviewed and adjudicated by the granting of certiorari.

In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 77-80 (1955), a case involving a denial of rights under the Fourteenth Amendment was affirmed by an evenly divided court. On petition for rehearing, an Iowa statute passed subsequent to the litigation in question was brought to the attention of the Supreme Court. This statute provided for relief in the future, the nature of which was sought in the litigation. On rehearing the writ was dismissed as improvidently granted. The court stated:

> "Such factors are among the many which must be weighed in the exercise of that 'sound judicial discretion' which Rule 19 requires. We have taken this opportunity to explain their relevance, when normally, for obvious reasons in view of our volume of business, no opinion accompanies dismissal of a writ as improvidently granted, because of the apt illustration here provided of the kinds of

considerations, beyond those listed by Rule 19 as illustrative but not exhaustive, which preclude adjudication on the merits of cases which may have the surface appearance of public importance." *Rice v. Sioux City Cemetery, supra,* at pp. 73-77.

It is clear from this opinion that the Supreme Court did not consider the dismissal of the writ of certiorari as an adjudication upon the merits of the constitutional question, however, it is equally clear that the decision was *res judicata* on that issue. The decision had no precedential value, but was a final determination of the case.

In *Needelman v. United States,* 362 U.S. 600, 601 (1960) and *Massachusetts v. Painten,* 389 U.S. 560, 560-62 (1968), writs of certiorari were dismissed as improvidently granted because the record was not sufficiently clear and specific to permit decisions of the important constitutional questions involved in the cases. The dissents in each of the cases indicated that there was a disagreement on that point. It is clear that there was no actual adjudication of the merits of the constitutional questions involved, yet, in those cases would it not be logical to hold that on the issue of the adequacy of the record to present the constitutional question, the decision was *res judicata,* and that in the absence of new facts, the lower federal courts would be bound on habeas corpus. In the instant case, one of the issues before the Supreme Court was the sufficiency of the record to support a denial of constitutional rights under *Massiah v. United States,* 377 U.S. 201 (1964) and *Escobedo v. Illinois,* 378 U.S. 478 (1964). *Wainwright v. City of New Orleans,* 392 U.S.

598, 598-600 (1968). In addition, the issue of the waiver of the constitutional objection was an issue of an adequate record on appeal. It was clearly indicated in the dissent of Mr. Justice Marshall that both of these issues were considered by the court and for one or more of them the majority dismissed the writ as improvidently granted.

In the case of *Henry v. Mississippi*, 379 U.S. 443, 443-453, 465 (1965) the constitutional question involved was the introduction of illegally seized evidence. The question before the Supreme Court was whether there had been a knowing waiver of the objection to the evidence in the trial court. The Supreme Court vacated the judgment of conviction and remanded the case for hearing on that question. Interestingly, the court concluded:

> ". . . It has been suggested that this friction might be ameliorated if the States would look upon our decisions in *Fay v. Noia*, *supra*, and Townsend v. Sain, *supra*, as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims. *That prospect is better served by a remand than by relegating petitioner to his federal habeas remedy.* . . ." *Henry v. Mississippi*, *supra*, at p. 453.

The opinion apparently was to the effect that if there was any question as to whether there had been a waiver, it should be remanded. Even more interesting was the dissent of Mr. Justice Harlan in which he concluded:

> "Believing that the judgment below rests on an adequate independent state ground, I would dismiss the writ issued in this case as improvidently granted." *Henry v. Mississippi*, Harlan, J., dissenting at p. 465.

Implicit in these opinions is the rule that in the event there is an open issue as to waiver on the record a proper procedure is to remand, but where the issue is clear that there was a waiver, the writ should be dismissed as improvidently granted. In the instant case, the issuer of waiver was disputed as evidenced by the dissenting opinion, yet the majority dismissed the writ as improvidently granted. We submit that that was an adjudication that there was an independent state ground for the decision. As implied by the majority opinion, this left respondent herein with the remedy of federal habeas corpus which she has pursued, however, in the absence of new facts the adjudication of the Supreme Court should be conclusive.

This result is supported by the decision in *Newsom v. Smyth*, 365 U.S. 604-07 (1961) in which the writ was dismissed as improvidently granted on the ground that the record did not adequately establish that the state court found or was required to find that there was presented to it the federal claim on which the case was brought to the Supreme Court so that the case failed to present a federal question. The dissent indicated a dispute on that issue in the Supreme Court.

Finally, the conclusion that a dismissal of a writ of certiorari as improvidently granted should be conclusive in the absence of newly discovered evidence is the case of *Smith v. Mississippi*, 373 U.S. 238, 238-39 (1963), in which the court stated:

> ". . . After oral argument and study of the record, we have reached the conclusion that the record is not sufficient to permit decision of his constitutional claims. The writ is therefore dismissed as improvidently granted, without prejudice to an application for federal habeas corpus relief under 28 U.S.C. § 2241 after exhaustion of any state remedies still open to him. (Citations omitted.)"

The implication from this decision is clear that as the record stood there were no constitutional errors, but that on habeas corpus where a record could be developed, habeas corpus might be able to grant relief.

It is respectfully submitted that as Justice Jackson pointed out in *Brown v. Allen, supra*, 344 U.S. 443 (1953), lawyers and lower courts cannot be expected to ignore the opinions written in conjunction with the dismissal of writs of certiorari, and where the lower federal courts are presented with sufficient opinions and records from which it can be determined that the Supreme Court has considered issues of fact and law, the dismissal of a writ of certiorari is in effect an adjudication on those issues binding upon the lower federal courts in the absence of new and controlling facts which could not have been presented to the Supreme Court.

III

Defense Counsel Deliberately By-Passed Established State Procedure and Deliberately Waived the Constitutional Issue of Error in the Introduction of the Testimony of An Undercover Agent

It is the present law in the State of California that on appeal the issue of denial of counsel during interrogation, after the enunciation of the rules in *Massiah, Escobedo* and *Dorado*, must be based upon an objection taken in the court below. *People v. Hillery*, 62 Cal. 2d 692, 711-12, 401 P. 2d 382; *People v. Doherty*, 67 Cal. 2d 9, 14-15, 429 P. 2d 177. The California cases place emphasis on the fact that the decision to waive objection to the introduction of statements of the accused can be attributed to a tactical decision by trial counsel.

In *Doherty* it was held:

> "In the absence of special circumstances justifying an inference of knowing and intelligent waiver of an Escobedo-Dorado claim, we cannot assume such a waiver in a trial held before January 29, 1965."[1]

But stated in that opinion:

> "We recognize that defense counsel in a trial held prior to January 29, 1965, might have deliberately developed on *voir dire* facts which would support the exclusion of the statements under the Escobedo-Dorado rule, yet omitted to object to their introduction in the hope that upon subsequent appeal the showing would serve to reverse. (Compare the facts in People v. Brown (1965) 238 Cal.App.2d 924, 928 [48 Cal.Rptr. 204].) Such a tactical maneuver should not generate a valid basis for reversal. If the People should sustain the burden of establishing the fact of such tactics, we would treat defendant's stratagem as a waiver of the objection."

The *Doherty* decision therefore established that in California in order to find a waiver of the *Escobedo-Dorado* rule benefit prior to January 29, 1965, an appellate court must find special circumstances justifying an inference of knowing and intelligent waiver of those benefits, such as the tactic of asking questions directed toward the foundation of such an objection but a failure to actually make the objection. The facts

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[1]*People v. Dorado*, 62 Cal. 2d 338, 398 P. 2d 361, was decided on January 29, 1965. Some of the *language* in our case which seemed to merely require absence of an objection in order to find a waiver was disapproved for such early cases.

of this case certainly justify such a waiver although the trial commenced only a few days before January 29, 1965. In circumstances not unlike those in the present case the California Court of Appeal in the case of *In re Woods,* 256 Cal. App. 2d 748, 752-53, 64 Cal. Rptr. 382, found a deliberate waiver of objection on an *Escobedo-Dorado* claim.

The tactics of counsel in the instant case were obvious. Except for the portion of Peggy Fisk's testimony which was introducted by the prosecution the remainder of her testimony was favorable to the defense, for it brought out that respondent had stoutly maintained her innocence and told identically the same story to which she later testified. Defense counsel had received a copy of the undercover agent's reports to her superiors concerning her talks with respondent and interviewed the witness, and it is reasonable to assume that defense counsel was willing to have the undercover agent testify to show the extremes to which the sheriff went to try to convict her and to show that her story of innocence had never varied. Indeed, defense counsel in argument utilized the undercover agent's testimony for both these purposes.

The federal courts will deny a defendant relief if the state courts refuse to entertain federal claims on the merits where a defendant for a strategic and tactical reason deliberately by-passes state procedures. *Fay v. Noia,* 372 U.S. 391, 439 (1963).

Where there is no objection to the evidence of statements of an accused on constitutional grounds the point is waived. *Sweeney v. United States,* 408 F. 2d 121, 124-25 (9th Cir. 1969); *United States v. Fioravanti,* 412 F. 2d 407, 414 (3rd Cir. 1969 citing:

United States v. Armetta, 378 F. 2d 658 (2nd Cir. 1967); *United States v. Dolleris,* 408 F. 2d 918, 920 (6th Cir. 1969). An objection not raised at the trial will not be considered on certiorari to the United States Supreme Court. *Brown v. Allen,* 344 U.S. 443, 480 (1953). A procedural default which is held to bar challenge to a conviction in state courts even on federal constitutional grounds prevents implementation of the federal right. *Henry v. Mississippi,* 379 U.S. 443, 447 (1965).

Counsel for respondent made no attempt to have testimony of the undercover agent stricken. The great bulk of her testimony was favorable to the defense, as already pointed out. [Rep. Tr. pp. 1101-1112; Appendix pp. 57-67.] Having deliberately chosen to waive her constitutional objection to the testimony of the undercover agent and to present the undercover agent's highly favorable testimony to the jury respondent cannot now complain. In effect, respondent has attempted to engage in the game of sowing the seeds of reversible error in the record decried in *Kotteakos v. United States,* 328 U.S. 730, 759 (1946). We submit that these seeds are infertile and should not be cultivated by this court.

In the case of *Nelson v. People of State of California,* 346 F. 2d 73 (9th Cir. 1965), it was contended that there was introduced against the appellant at her trial evidence obtained in violation of his rights under the Fourth Amendment to the Constitution of the United States and that there was an unlawful search of his apartment and seizure of contraband by the police. In the trial, the police on three separate occasions offered in evidence articles obtained from the search of the apartment and on each occasion there

was no objection. The district court concluded from his examination of the transcript that the petitioner had deliberately by-passed the required state procedure by such failure to object. The district Court found that the search and seizure question would not have been well taken had it been raised, in light of the decision of the California Court of Appeal; that appellant had been competently represented by counsel and that petitioner at no time contended that in handling the matter as he did his counsel was acting contrary to his wishes. In that case the district court based its conclusion upon an examination of the state trial record. It felt that that record demonstrated that counsel intentionally, as a matter of tactics, failed to raise the constitutional questions. And it noted that the petitioner did not assert, in any paper before the district court, that he did not participate in the decision, or that counsel acted contrary to his wishes, or that he was unaware of, and did not understand counsel's choice.

The Ninth Circuit Court of Appeals in affirming the denial of the petition for writ of habeas corpus held that the deliberate failure to object to the introduction of evidence on the ground of illegal search and seizure where the State of California requires such an objection constituted a deliberate by-passing of state procedure without the necessity of concurrence in that decision of counsel by petitioner. The court, relying upon *Henry v. Mississippi*, 379 U.S. 443 (1965), and *Fay v. Noia*, 372 U.S. 391 (1963) (cited by petitioner before in the United States Supreme Court), held that the California rule requiring an objection to illegally obtained evidence does serve a legitimate state interest; that deliberate by-passing of state procedure and waiver are usually the same thing; that counsel's decision controls

despite the lack of concurrence by the client and that the effectiveness of the procedural default to foreclose consideration of a constitutional claim is the same on habeas corpus as on direct review. This reasoning is, of course, equally persuasive in our case where there was a deliberate tactical decision to waive objection to statements counsel claimed were illegally obtained so that the favorable aspects of the statements might be introduced and argued by the defense. *Curry v. Wilson*, 405 F. 2d 110, 113 (9th Cir. 1968).

We respectfully submit that the record shows a deliberate, knowing, intelligent and tactical waiver of a claim under the *Massiah* and *Escobedo* decisions.

The Ninth Circuit Court of Appeals held that the California District Court of Appeal reached the merits of petitioner's claim when it stated:

> "The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible, and if we had the slightest idea that defendant was injured by it we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object to Peggy's testimony. . . ." *People v. Miller*, 245 Cal. App. 2d 112, 143-44, 53 Cal. Rptr. 720.

The Court held that neither the by-pass rule nor the waiver rule set forth in *Curry v. Wilson*, 405 F. 2d 110, 112 (9th Cir. 1968) applied to the conduct of defense counsel in deliberately withholding any objection or seeking any rule on the admissibility of the undercover agent's testimony in the instant case. We

respectfully submit that this holding is erroneous for two reasons: (1) the California District Court of Appeal did not reach the merits of the admissibility of the evidence, but merely held that regardless of error, it was harmless, and since there was no objection in the trial court, the error was waived, and (2) as pointed out above, there can be no distinction drawn between *Curry* and the instant case on the basis set forth in the opinion of the Court that in *Curry* defense counsel wanted the evidence admitted, but in our case defense counsel wanted the evidence excluded.

In its opinion, the California Court of Appeal, after the language quoted by the Ninth Circuit Court of Appeals went on to state:

> ". . . . However, to do so just to administer to the sheriff and those joining in this most inexcusable procedure a well-merited rebuke where no injury occurred to defendant therefrom would not be fair to the County of San Bernardino nor to defendant in requiring her to undergo the strain of another trial.
>
> "We have in mind Massiah v. United States, 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246]; People v. Dorado, 62 Cal.2d 338 [42 Cal.Rptr. 169, 398 P.2d 361]; and Escobedo v. Illinois, 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], but do not consider, under the peculiar circumstances in this case, there was any prejudicial error. Moreover, as pointed out in People v. Palmer, 236 Cal. App.2d 645, 650 [46 Cal.Rptr. 449], referring to Escobedo, failing to object in the trial court precludes raising the matter on appeal, the court saying: 'But the Supreme Court indicates, at

> least inferentially, in the same authorities that the raising of the issue on appeal, after the enunciation of the rule in the Escobedo case, must be based upon an objection taken in the court below.' See also, People v. Valdez, 239 Cal.App.2d 459, 465 [48 Cal.Rptr. 840], applying the same rule as to an Escobedo-Dorado situation." (Emphasis added.) *People v. Miller,* 245 Cal. App. 2d 112, 144, 53 Cal. Rptr. 720, 740 (1966).

It should be noted in the opinion of the California Court of Appeal that the court first treated the substance of the undercover agent's testimony and found that defense counsel had deliberately determined to allow the witness to testify in order to show (1) that the extremes to which the sheriff went to try and convict appellant, and (2) that appellant's story of her innocence had never varied. *People v. Miller, supra,* 245 Cal. App. 2d at p. 143, 53 Cal. Rptr. at p. 740. The court then went on to treat the specific trick engaged in by the sheriff and the undercover agent mentioned earlier in the opinion at pages 141-142. It was concrning this "indefensible" conduct that the court made the statement "we would have no hesitancy in ordering a reversal in spite of the fact of defendant's failure to object." It was obvious from the testimony of the undercover agent that these tricks had borne no fruit. Nowhere in the record is it established that any of these tricks resulted in any of the statements made by appellant to the undercover agent. Furthermore, the reference to the failure to object was not a holding that appellant was entitled to raise the point on appeal absent an objection or that it was error to have admitted the testimony of the undercover agent because the court went on to hold that appel-

lant was precluded from raising the point by reason of the failure to object. *People v. Miller, supra,* 245 Cal. App. 2d at p. 144, 53 Cal. Rptr. at p. 740. The above statement appears to have been made to emphasize the fact that there was no possible prejudice from the introduction of the undercover agent's testimony. It was necessary for the District Court of Appeal to emphasize harmless error because of the fact that the California Supreme Court had not as yet set down the exact form of the rule for the necessity of an objection based upon the *Dorado-Escobedo* type error although other courts of appeal had. However, since the decision in this case, the California Supreme Court decided *People v. Doherty,* 67 Cal. 2d 9, 15-16, 429 P. 2d 177, which explicitly upholds a waiver such as occurred in this case.

We respectfully submit that the California District Court of Appeal merely decided that regardless of whether or not there was error in the introduction of the undercover agent's testimony, the evidence was harmless and objection was waived.

The Ninth Circuit Court of Appeals found no waiver and distinguished *Curry v. Wilson,* 405 F. 2d 110, 113 (9th Cir. 1968) on the basis that counsel in *Curry* wanted the evidence to be before the jury because he believed that it would be valuable to Curry, whereas trial counsel in the instant case considered the evidence prejudicial rather than valuable and wanted it excluded. This is factually incorrect. In our case, the record at Reporter's Transcript pages 1009-1015 clearly shows that counsel did not even know the nature of the evidence when he *represented* that the testimony would violate *Dorado.* His complaint in chambers was that he had been promised an opportunity to interview the wit-

ness and learn of her testimony. He was given that opportunity immediately, and an opportunity to object to the testimony the following day if he wished. He made no objection and sought no ruling in chambers. It is obvious, and the California District Court of Appeal held that it was "reasonable to assume that defense counsel was willing to have Peggy testify to show (1) the extremes to which the sheriff went to try to convict defendant and (2) that defendant's story of her innocence had never varied." *People v. Miller, supra,* 245 Cal. App. 2d 112, 143, 53 Cal. Rptr. 720, 740.

It is clear in the instant case that just as counsel in *Curry* had wanted the evidence admitted as a matter of defense strategy, defense counsel at the trial herein made the tactical decision to use and did use the undercover agent's testimony to the advantage of the defense in the questions he asked and in the arguments he made to the jury. [Rep. Tr. pp. 1101-1112, 2174-2176, 2181-85, 2238-39, 2243-45; Appendix pp. 57-67, 121-31.]

The entire circumstances wherein, (1) counsel at first raised the constitutional question without objecting or seeking a ruling in chambers then abruptly dropped the issue and withheld objection, (2) counsel followed with extensive cross-examination which brought forth a story of complete innocence, and (3) counsel made an elaborate argument based upon the undercover agent's testimony, demonstrates that defense strategy inescapably brings this case squarely within the *Curry* waiver rule as well as *People v. Doherty, supra.* Once counsel knew what the witness knew, he wanted her testimony admitted. It was her best defense. It was her only corroboration.

It is respectfully submitted that in light of these circumstances there is a conflict of decision between *Curry* and the instant case, and that under the circumstances, it would be appropriate for certiorari to be granted.

The Ninth Circuit Court of Appeals erroneously held that counsel objected to the evidence in chambers when there was actually no objection and no request for a ruling in chambers. The trial court did not insist that the objection be renewed in the presence of the jury but merely suggested that his reasoning indicated that procedure. Counsel may have felt compelled to refuse the objection in the presence of the jury believing that a successful objection might lead the jury to speculate that the excluded testimony was more incriminating than it actually was, but there was no justification for that compulsion under the law.

Under California law counsel for respondent could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by respondent to the undercover agent were voluntary and were not obtained in violation of respondent's right to counsel and against self-incrimination. *People v. Schader*, 62 Cal. 2d 716, 727-28, 401 P. 2d 665. In that case the California Supreme Court held that pursuant to the case of *Jackson v. Denno*, 378 U.S. 368 (1964) and the case of *People v. Gonzales*, 24 Cal. 2d 870, 877-78, 151 P. 2d 251, this procedure should be followed by the trial court. Counsel for respondent made no such request for the obvious reason that after having reviewed the report of the undercover agent and after having privately interviewed her, he determined that it was in the best interests of his client that the undercover agent be per-

mitted to testify. This is the only reasonable conclusion that can be drawn from the record. The trial court had not ruled that counsel would not be permitted to introduce evidence on the issue of the foundation for the undercover agent's testimony. There had been no objection, no complaint, and *no ruling* on the applicability of the *Massiah*, *Escobedo* or *Dorado* decisions. There had merely been a discussion in chambers of the applicable law which was never renewed by counsel.

The Ninth Circuit Court of Appeals has incorporated the argument of Mr. Justice Marshall in his dissenting opinion that there was no waiver of the issue in the trial court because an objection was made in chambers and not renewed in open court because of a fear of prejudicing the jury. This argument was rejected by the majority of the United States Supreme Court. Otherwise Mr. Justice Marshall's opinion would have been the majority. There is no question on this record but that the proceedings in chambers were no more than a discussion of the applicable law. Defense counsel made no objection and was invited to make an objection at the proper time. Although the court indicated an opinion that there would have to be an objection in the presence of the jury, California law as pointed out above provides for objections in the absence of the jury at which time a foundation could have been laid and a proper objection made. Under those circumstances the trial court would have been called upon to rule as to the admissibility of the evidence in this case. The trial court was not called upon to rule as to the admissibility of the undercover agent's testimony and therefore there was no opportunity in the trial court for the error to have been obviated. This was the basis of the District Court of Appeal's de-

termination that the lack of an objection had waived the error. There was no necessity for defense counsel to have waited for the prosecution to prove the activities of the witness before the witness was taken on *voir dire* examination to lay a proper foundation for the objection. We repeat that defense counsel was convinced that testimony of the undercover agent had far more value for the defense than detriment and deliberately waived the opportunity to exclude the evidence so as to present favorable testimony for the defense. Such tactics should not be rewarded by a reversal at this late date on evidence that could have been excluded if constitutionally infirm had proper action been taken at the time it was offered. *Douglas v. Alabama,* 380 U.S. 415, 422 (1965) cited by Mr. Justice Marshall and *Whitus v. Balkcom,* 333 F. 2d 496 (5th Cir. 1964) cited by the Ninth Circuit Court of Appeals have no application whatsoever to this case because counsel was not required to renew an objection properly made. Counsel withheld his objection until he interviewed the witness and then actually decided that it would be best for his case not to object to the evidence. Nor does the record show that there would have been any futility in raising an objection as was the case in *Douglas v. Alabama.*

The Court below has actually held that there was an excuse for failing to object to the evidence. This argument cannot prevail because the State of California was not given the opportunity to determine the admissibility of the evidence at the trial so as to either lay a solid foundation or obviate the error. Judge Trask was entirely correct in his dissenting opinion in the instant case that there was no ruling by the trial court on the admissibility of the evidence in advance, that there was

no request for an *in limine* hearing, and, therefore, no way of knowing whether the trial court would have permitted the testimony or not. Therefore, "[I]t is difficult to imagine a more voluntary, considered, conscious and stragetic waiver" than the one that occurred in this case. *See also: Evans v. Cupp,* 415 F. 2d 844, 846 (9th Cir. 1969) and *Hill v. Nelson,* 423 F. 2d 167, 168 (9th Cir. 1970).

Conclusion

For the foregoing reasons it is respectfully requested that a writ of certiorari be granted to these questions of exceptional importance and thereby establish uniformity of decision in the altogether delicate field of federal review of state criminal prosecutions.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Lucille Miller, *Petitioner-Appellant,* v. Iverne R. Carter, Warden, et al., *Respondents-Appellees.* No. 24,365.

[October 9, 1970]

Appeal from the United States District Court for the Central District of California

Before: HAMLEY, BROWNING, and TRASK, Circuit Judges

PER CURIAM:

Petitioner was convicted of first degree murder in the Superior Court of San Bernardino County, California, and sentenced to life imprisonment. Her conviction was affirmed by the California District Court of Appeal, *People v. Miller,* 245 Cal.App.2d 112, 53 Cal. Rptr. 720 (1966). The Supreme Court of the United States initially granted certiorari, *Miller v. California,* 389 U.S. 968 (1967), but after hearing oral argument ordered the writ dismissed as improvidently granted, *Miller v. California,* 392 U.S. 616 (1968).

Petitioner then commenced this federal habeas corpus proceeding, contending, as she had in her petition for certiorari to the Supreme Court of the United States, that her constitutional rights were infringed by the government's use of the testimony of an undercover agent placed in her jail cell after her arrest. The district court dismissed the petition, holding that petitioner had deliberately bypassed state procedures, and, in any

event, that the Supreme Court of the United States had adjudicated the merits of petitioner's constitutional claim against her.

The court erred on both grounds.

The California District Court of Appeal reached the merits of petitioner's claim, stating that it "would have no hesitancy in ordering a reversal," except for its conclusion that petitioner had not been prejudiced by the informant's testimony. *People v. Miller, supra,* 245 Cal.App.2d at 141-44, 53 Cal. Reptr. at 720, 738-40. "Under these circumstances the deliberate bypass rule is not available. Warden v. Hayden, 1967, 387 U.S. 294." *Curry v. Wilson,* 405 F.2d 110, 112 (9th Cir. 1968). Nor does the record conclusively establish "waiver" in the *Curry v. Wilson* sense. In that case it appeared from the record that "counsel wanted the evidence to be before the jury because he believed that it would be valuable to Curry in support of the only defense that offered even a remote chance of success." 405 F.2d at 113. Here, however, the record shows that petitioner's trial counsel considered the evidence prejudicial rather than valuable and wanted it excluded. He objected to the evidence in chambers, but the trial judge erroneously, *see People v. Schader,* 62 Cal.2d 716, 727-28 (1965), insisted that the objection be renewed in the presence of the jury. Counsel felt compelled to refuse, *see Whitus v. Balkcom,* 333 F.2d 496 (5th Cir. 1964), believing that a successful objection might lead the jury to speculate that the excluded testimony was more incriminating than it actually was. *See Miller v. California,* 392 U.S. 616, 622-23 (1968) (Justice Marshall dissenting).

28 U.S.C. § 2244(c) provides that "a prior judgment of the Supreme Court of the United States on an

appeal or review by a writ of certiorari at the instance of the prisoner . . . shall be conclusive . . . as to all issues of fact or law . . . *actually adjudicated* by the Supreme Court" (emphasis added) when those issues are raised in a subsequent federal habeas corpus proceeding. In enacting section 2244(c) Congress "intended to give a conclusive presumption only to actual adjudications of Federal rights, by the Supreme Court, and not to give such a presumption to mere denials of writs of certiorari." S. Rep. No. 1797, 1966 U.S. Code Cong. & Adm. News 3664. The Supreme Court of the United States did not adjudicate petitioner's claim; it merely dismissed the writ of certiorari, an action indistinguishable, in this instance, from a denial of certiorari.

Duncan v. Carter, 299 F.2d 179 (9th Cir. 1962), relied upon by the court below, is distinguishable. There the Supreme Court's per curiam opinion dismissing the writs expressly adjudicated the merits. The court stated, "the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petitions for certiorari. . . ." *Baldonado v. California,* 366 U.S. 417 (1961).

Reversed and remanded for further proceedings.

TRASK, Circuit Judge (Dissenting):

It appears to me, as it did to the district court, that this case is governed by our decision in *Curry v. Wilson,* 405 F.2d 110 (9th Cir. 1968). I would therefore affirm the decision of the district court which denied the petition for habeas corpus.

In *Curry* a state court conviction had been obtained on evidence which it was claimed was secured in violation of the accused's constitutional rights. No objec-

tion to the introduction of this evidence was made at the trial. In the District Court of Appeal Curry's contentions were considered on the merits and rejected. The deliberate by-pass rule was therefore not available under *Worden v. Hayden,* 387 U.S. 294, 297 n. 3 (1967). On an appeal from a denial of writ of habeas corpus, this court then went on to consider whether or not there had been a deliberate waiver. Said the circuit court:

> "In our opinion the record of Curry's trial conclusively shows that his counsel deliberately, as a matter of trial strategy, which proved [be] successful, waived those grounds. What counsel did was not a mere by-passing of a contemporaneous objection rule. It was an affirmative decision to waive the objections that he might have raised. That waiver is binding on Curry." 405 F.2d at 112.

Waiver affecting federal rights is a federal question. *Fay v. Noia,* 372 U.S. 391, 439 (1963). The majority here apparently recognizes and follows *Curry v. Wilson* to this extent. The majority states however, that the record does not "conclusively establish 'waiver' in the *Curry v. Wilson* sense." Thus the court points to the fact that in *Curry,* trial counsel affirmatively wanted the objectionable evidence to come in because he thought it would be valuable to his client. In the present case, on the contrary, counsel considered the evidence prejudicial and wanted it excluded. Factually such a distinction exists.

In each case counsel knew what the proposed evidence would be. In each case a considered judgment was made as to whether or not an objection should be

interposed. The district judge here determined that there was a deliberate choice made and that such choice constituted a waiver. Said Judge Whelan:

> "Where, as here, there has been a deliberate by-passing of state procedures through a conscious and planned waiver of a legal objection to the admission of evidence for a strategic and tactical reason, this court should not grant habeas corpus relief. *Fay v. Noia,* 372 U.S. 391."

I agree. Nor should the fact that in *Curry, supra,* counsel "wanted" the objectional evidence to be introduced, believing he could make use of it, constitute a significant distinction. The controlling factor is not the motivation for the strategy decision, but the deliberate choice which is made. In *Nelson v. California,* 346 F.2d 73 (9th Cir. 1965) it did not appear that trial counsel "wanted" the evidence to be introduced. Yet he there made his choice and having made it, he was held to have waived the right to assert his objections in the habeas proceeding.

It is also suggested by the majority that counsel here was forced to forego his objection because the trial judge indicated the objection would have to be made in open court and that the jury might draw an adverse inference from the objection if sustained. It is asserted that this requirement of the trial judge to have the objection made in open court was erroneous on the basis of *People v. Schader,* 62 Cal. 2d 716, 727-728 (1965), 401 P.2d 665, 44 Cal. Rptr. 193 (1965). I disagree. In *Schader* the trial judge conducted a voir dire hearing in the presence of the jury on the voluntariness of a confession, leaving the consideration or rejection of the confession to the jury on an instruction

as to its voluntary or involuntary character. As the Supreme Court of California there pointed out, there was no way to know from such a record just how the jury considered the evidence and whether it did so properly or improperly. The situation here was quite different. There was a discussion of the proposed witness in the chambers of the court before she was permitted to testify. Counsel was given an opportunity to interview her before she was put on. There was no confession involved; indeed, the witness testified that the accused insisted upon her innocence. There was no ruling by the trial court on admissibility in advance. The witness was not recalled until the next morning. No request for an *in limine* hearing was made at the time. Contrary to *Schader* there is no way of knowing whether the court would have permitted the testimony or not. No objection to it was made. It is difficult to imagine a more voluntary, considered, conscious and strategic waiver than this.

I agree with the majority that the action of the Supreme Court of the United States in granting certiorari and then dismissing the writ without opinion does not constitute an adjudication.

APPENDIX B.

Order Denying Petition for Writ of Habeas Corpus and Dismissing Action.

United States District Court, Central District of California.

Lucille Miller, Petitioner, v. Iverne R. Carter, Warden, California Institution for Women at Frontera, California, Ray Procunier, Director of Corrections, State of California, Respondents. No. 68-1470-FW.

Petitioner prays for a writ of habeas corpus. She is presently serving a sentence of life imprisonment for first degree murder imposed by the Superior Court of the State of California in and for the County of San Bernardino. She is confined in the California Institution for Women by the individually named respondents in their official capacities as shown in the caption hereof.

A non-evidentiary hearing has been held in this matter and the application has been submitted for decision after counsel for all parties have filed written legal memoranda in support of their respective positions and after oral argument by counsel.

In her petition and in other papers filed in the proceedings petitioner alleges three points as grounds for her claim that her conviction resulted from a violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the U. S. Constitution and that her sentence was therefore illegally imposed. Those points in essence are as follows:

1. She alleges that Police Sergeant Patterson was allowed to give testimony concerning his interrogation of petitioner and her answers thereto, and that the tape recording of such interview by Patterson was admitted

in evidence over vigorous objections by defense counsel; that such admission in evidence was a violation of petitioner's constitutional rights in that she was interrogated by Patterson outside of the presence of her attorneys after her arrest and after her attorneys had advised Sergeant Patterson and other police that she would make no statements to them.

2. She alleges that the automobile in which her husband died commenced burning at approximately 1:30 o'clock A.M. and that the burning continued for some three hours; that an examination and search of her automobile was conducted by police officials at the scene shortly after 8:00 A.M. on the same day; that approximately one hour later the automobile was taken to a garage some five miles away and again searched; and that petitioner was arrested without a warrant some four hours after the vehicle was removed from the scene; that all examinations and searches were conducted without warrant and were not incident to an arrest; and that evidence obtained thereby was subsequently illegally introduced against petitioner at trial.

3. That after her arrest and on October 9, 1964, (she was arrested on October 8, 1964) Peggy Fisk, an undercover agent in the employ of the County Sheriff's Office, was falsely booked into jail on a fictitious narcotics charge and placed in petitioner's cell. Two other prisoners who had shared the cell were later removed. Petitioner further alleges that Fisk did not advise petitioner that she was an agent of the Sheriff and placed in the cell to report on anything petitioner might say. Fisk remained alone with petitioner until October 15, 1964, giving oral reports as to their conversations from time to time to the Sheriff's Office;

petitioner alleges a written report was prepared by Fisk on October 12 and partly on October 14, 1964. She further alleges that on October 13 after she was arraigned on a formal complaint charging her with murder that a judge issued an order prohibiting officials from questioning petitioner unless her attorney was present. Petitioner alleges that the court order was violated in that Fisk was kept in the cell with petitioner until October 15.

Petitioner alleges that the admission in evidence of Fisk's testimony as to what petitioner told Fisk in the cell after her arrest for murder violated her constitutional rights in that it was procured through deception in violation of her Fifth and Sixth Amendment rights.

DISCUSSION OF HER CONTENTIONS

1. With respect to the Patterson testimony question, counsel for petitioner at the time of oral argument herein stated that they were not pressing the Patterson matter and conceded that there was in fact no objection made at petitioner's criminal trial to the introduction of such testimony. Such being the fact, and the constitutional issue as to the propriety of allowing such testimony in evidence never having been raised in any state court, this Court need not consider this issue for the reason that petitioner has not exhausted her state remedies regarding it. Title 28, United States Code, Section 2254. Therefore, this first point of petitioner does not entitle her to relief in this action.

2. While counsel for petitioner did not devote any oral argument at the hearing to the contention made in her petition that there was an illegal search of the burned automobile belonging to the defendant and her deceased husband, the contention was not waived by

petitioner and therefore is now considered by the Court. The evidence which plaintiff contends was illegally received at her murder trial because of what she alleges was an illegal search is the testimony of the witness Snare. In the chambers of the trial judge during the course of trial and outside the presence of the jury, petitioner's trial counsel objected to the introduction of the testimony of Mr. Snare on the grounds that it was the product of a search without a warrant and not incidental to a lawful arrest.

At that hearing in chambers the state trial judge ruled that there had in fact been no search of the automobile and ruled that Snare's testimony was admissible.

At the time that the trial judge so ruled there had been testimony received in evidence by Fire Chief Hogancamp. He testified that when he arrived at the scene of the burning car in the early morning of October 8th he found the lefthand door of the car open. At that time the trunk lid was not open nor was the engine lid open, but in order to fight the fire he opened or caused the trunk lid and engine lid to be opened. Water was poured on the fire. At that time the fire was burning in the engine section and there was a little fire in back of the back seat of the car. When Mr. Snare first examined the automobile the engine lid and trunk lid were still propped open.

Snare testified he made a cursory examination of the automobile on the evening of October 8th after he had first looked at the area where the car had burned and from which area the car had by that time been moved. That evening he gave the car only a quick examination, and the next day he went back for a more detailed examination of the car.

This Court has read the entire record of Snare's testimony and it appears therefrom that he examined those portions of the car which were then readily available to his sight, so that this Court is satisfied that the entire record supports the conclusion of the state trial court judge that there was in fact no illegal search.

Furthermore, the conclusion of the California District Court of Appeal, in ruling on appeal that the search was reasonable, is supported by the record. The District Court of Appeal held that it was the duty of the police where a man had been burned to death in an automobile to determine the fire's cause; the District Court of Appeal stated, "The situation is analogous to that where a person suspected of homicide is found in possession of a gun. It has never been held that a search warrant is necessary to enable the police to test that gun by firing bullets from it to determine if the gun was the one used in the killing." *Miller v. California,* 245 Cal. App. 2d 112, 140.

Petitioner is not entitled to any relief upon this, her second contention.

3. However, counsel for petitioner strongly urge that the admission into evidence of the testimony of Peggy Fisk, the undercover agent in petitioner's jail cell, constitutes a violation of her constitutional rights against self-incrimination under the Fifth Amendment and of her right to the assistance of counsel under the Sixth Amendment. The note that trial counsel for petitioner in the state court criminal trial during the course of a conference in the trial judge's chambers in the absence of the jury objected generally to the admission of such testimony. The trial judge then advised such trial counsel that objection would have to be made at

the proper time after preliminary questions were put to Fisk in the presence of the jury; such trial counsel chose not to interpose an objection when Fisk was interrogated before the jury. The failure to interpose such objection is a clear instance of waiver of the right to now complain of such testimony; *the affidavit of such trial counsel now submitted by petitioner herein makes clear that his failure to object was a deliberate choice, and the reasoning disclosed by his affidavit demonstrates that he was a seasoned trial lawyer and aware of the legal and psychological aspects of a successful criminal defense.* Where, as here, there has been a deliberate bypassing of state procedures through a conscious and planned waiver of a legal objection to the admission of evidence for a strategic and tactical reason, this Court should not grant habeas corpus relief. *Fay v. Noia,* 372 U.S. 391.

The deliberate bypassing of the state's contemporaneous objection rule precludes consideration of the issues now raised. See *Curry v. Wilson,* 405 F.2d 110, 111 (9th Cir. 1968) citing *Nelson v. California,* 346 F.2d 73 (9th Cir. 1965), *cert. den.* 382 U.S. 964. Also it is clear from statement of petitioner's trial counsel to the state trial judge during the course of the chambers' conference mentioned that such counsel was fully cognizant of the implications of the *Massiah* and *Escobedo* rulings of the Supreme Court as well as the ruling of the California Supreme Court in *Dorado.*

There is a more compelling reason why petitioner's claim respecting the Fisk testimony does not justify the

granting of any relief in this action. That reason is the fact that the U. S. Supreme Court, after first granting certiorari to consider whether the admission of the Fisk testimony in evidence constituted a violation of petitioner's right to a fair trial, subsequently dismissed the petition for certiorari as improvidently granted. *Miller v. California,* 392 U.S. 616 (1968).

Petitioner's counsel herein contend that such ruling of the Supreme Court should not be determinative here. This Court notes that the minority of the Supreme Court, speaking through Mr. Justice Marshall, discusses the constitutional questions now raised by petitioner and the reasons why they considered that petitioner's conviction should be reversed; it would therefore appear that the Supreme Court did indeed consider whether there was any violation of constitutinal rights meriting its consideration on certiorari.

The Court of Appeals for the Ninth Cirucit has already considered the binding effect of the dismissal of a writ of certiorari by the Supreme Court in a case similar in legal effect to the instant action. In *Duncan v. Carter,* 299 F.2d 179, 182, the Court of Appeals in speaking of the effect of the dismissal of a writ of certiorari by the Supreme Court stated: "It was in practical effect an adjudication. Where a question of law is actually adjudicated by the Supreme Court, and where no newly discovered facts are alleged which would cast a legal question in a new light, a district or circuit judge is bound thereby as in the case of any adjudication of a question of law by the Supreme Court."

Here there are no new facts asserted by petitioner and the ruling by the Supreme Court is binding on this Court.

IT IS THEREFORE THE ORDER OF THIS COURT that petitioner is not entitled to a writ of habeas corpus, and

IT IS FURTHER ORDERED that her petition is denied and this action is dismissed.

DATED this 24th day of March 1969.

Francis C. Whelan
United States District Judge

Supreme Court, U.S.
FILED
APR 21 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1264~~ 1246

IVERNE R. CARTER, Warden, et al.,
PETITIONERS,

v.

LUCILLE MILLER,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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In the
Supreme Court of the United States

OCTOBER TERM, 1970

No. 1264

IVERNE R. CARTER, Warden, et al.,
PETITIONERS,

v.

LUCILLE MILLER,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals and the United States District Court for the Central District of California are appended to the Petition. The per curiam dismissal by this Honorable Court of Respondent's Writ of Certiorari as having been improvidently granted is appended hereto as Appendix A.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

I. Did Respondent deliberately by-pass state procedures by her institution of federal Habeas Corpus proceedings, where the state court had actually passed on the merits of her claim?

II. Did this Honorable Court, in dismissing, per curiam, Respondent's Writ of Certiorari as improvidently granted, adjudicate the merits of her constitutional claim so as to bar her from subsequent federal Habeas Corpus relief?

III. Did Respondent waive her constitutional objection to illegally obtained testimonial evidence when her counsel did specifically object, on federal constitutional grounds, to the introduction of said evidence and specifically objected to the trial judge's ruling that the objection must be renewed in the presence of the jury?

Constitution and Statutory Provisions Involved

This case involves 28 U.S.C. § 2244(c), reflected on Page 3 of the Petition as well as S. Rep. No. 1797, 1966 U.S. Code Cong. & Adm. News 3664.

Statement of the Case

Respondent was convicted of first degree murder in the Superior Court of San Bernardino County, California, and sentenced to life imprisonment. Her conviction was affirmed by the California District Court of Appeal, *People* v. *Miller,* 245 Cal. App. 2d 112, 53 Cal. Rptr. 720 (1966). The Supreme Court of the United States initially granted certiorari, *Miller* v. *California,* 389 U.S. 968 (1967), but after hearing oral argument ordered the writ dismissed as improvidently granted, *Miller* v. *California,* 392 U.S. 616 (1968).

Respondent then commenced this federal habeas corpus proceeding, contending, as she had in her petition for certiorari to the Supreme Court of the United States, that her constitutional rights were infringed by the government's use of the testimony of an undercover agent placed in her jail cell after her arrest. The district court dismissed the petition, holding that Respondent had deliberately by-passed state procedures, and, in any event, that the Supreme Court of the United States had adjudicated the merits of Respondent's constitutional claim against her.

By decision dated October 9, 1970 the United States Court of Appeals for the Ninth Circuit reversed and remanded the case for further proceedings finding that Respondent had not deliberately by-passed state procedures in applying for federal habeas corpus relief, that she had not waived her constitutional claim and that this Honorable Court, in dismissing the writ of certiorari as improvidently granted did not adjudicate the merits of her constitutional claim.

On December 18, 1970 said court of appeals denied Petitioner's motion for a re-hearing en banc.

Statement of Facts Pertinent to the Questions Presented

At 1:50 p.m. on October 9, 1964, three deputy sheriffs entered Mrs. Miller's home and placed her under arrest for murder. (R. 60, 1017) She was taken to the San Bernardino County jail where she was met by her attorney and "booked" for murder. (R. 1018) At 9:00 a.m. she was taken from her cell and questioned for several hours.

At about 11:00 p.m. on October 9, Peggy Fisk, an undercover agent in the employ of the Sheriff's office, was falsely "booked" on a narcotics violation and placed in Respondent's cell. (R. 1103) Shortly thereafter, the two other prisoners who had been sharing the cell with Re-

spondent were removed so that Miss Fisk could be alone with Respondent in the cell. (R. 1107-08) Miss Fisk remained alone in the cell with Respondent for 7 days, until October 15. During that entire period, Respondent had a number of retained lawyers who remained on duty outside her cell 24 hours a day in order to assure that the authorities would respect her privilege against self-incrimination. (R. 2319) Respondent, of course, did not have counsel inside the cell. Nor did she think she needed one there, for Miss Fisk never told Respondent that she was a police agent rather than a real prisoner, or that she had a right to remain silent and have an attorney present at all their "discussions". On October 13, during the period that Miss Fisk was in the cell, Respondent was brought before Superior Court Judge John Kerrigan and formally charged with first degree murder. Miss Fisk remained in the cell and continued to obtain incriminating information even after Respondent had been formally charged. The judge issued an order prohibiting officials from questioning Respondent unless her attorney was present. He also ordered Respondent's attorneys to stop sitting outside the cell. The prosecutor violated the order by keeping Miss Fisk in the cell with Respondent until October 15.

Peggy Fisk was called as a government witness. Respondent's counsel objected to permitting Miss Fisk to testify, on the ground, among others, that such testimony would violate "the rule in *Messiah* [sic] *versus the United States.*" Peggy Fisk testified that Respondent had admitted to her that "she did not love her husband;" that "she always loved Mr. Hayton and still did"; and that she was planning to go to Europe with the $100,000 insurance. (R. 1100-01) The prosecutor relied heavily on Miss Fisk's testimony during the course of the trial and in his closing remarks to the jury. (R. 1258-59, 2019, 2061-62, 2318-20)

The jury deliberated for more than three days before they returned a verdict of guilty of murder in the first degree. (R. 2376, 2441) The prosecutor then announced his intention to waive a jury determination of the penalty and not to ask for the death sentence; the judge sentenced Respondent to life imprisonment. (R. 2447-50)

When Peggy Fisk, the sheriff's undercover agent, was called to the stand as a witness for the prosecution, Respondent's counsel, Mr. Foley, objected to "any evidence from this witness at this particular time." The ground stated in support of the objection at that time was non-federal. (R. 1007) At the suggestion of the court, proceedings were then continued outside the hearing of the jury in the Judge's Chambers. The proceedings remained on the record and the following persons were present: The Judge; the Deputy District Attorney; the defense attorney; the defendant; and the Court Reporter. (R. 1008) At this time the defense attorney added the following federal objection: "I am going to represent to the court also that any testimony of the witness concerning any statement made by my client would be in violation of the rule in the *Dorado* case. She was an undercover agent, and never informed my client of her capacity. Never advised my client of [her] right to remain silent. So any testimony of this witness concerning statements made by my client not only violates the rule in the *Dorado* case, but . . . also the rule in *Messiah* [sic] *versus the United States.*" (R. 1009) The deputy district attorney replied at length to defense counsel's objection. He admitted that Peggy was an undercover agent (R. 1009) but asserted that because "no attempt was made to force [Respondent] to talk" (R. 1011), any "statements which [Respondent] made" (R. 1012) could be introduced into evidence. Defense counsel asserted, in response, that under the cases he had cited it was "one of our rights as an attorney to demand to be

present . . . and this woman did not advise my client that she was a law enforcement agent. It was by trickery and device that she tried to obtain statements from my client." (R. 1012) The court, responding to Mr. Foley's non-federal objection, suggested that the state withdraw Peggy until the following day. In response to the *Dorado-Messiah* objection the court ruled, however, that "we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time." (R. 1015) Respondent's attorney, Mr. Foley, disputed the judge's requirement that he must object in the presence of the jury after the preliminary questions, asserting: "You know that isn't right, your Honor." The judge then concluded the hearing by saying: "I don't see how it could be done in the absence of the jury." When Peggy was called to the stand the following day (R. 1098), defense counsel did not renew his objections to the admission of Peggy's testimony in the presence of the jury, and he cross-examined her.

Argument

I. Respondent Did Not Deliberately By-pass State Procedures by Her Institution of Federal Habeas Corpus Proceedings, Where the State Court Had Actually Passed on the Merits of Her Claim.

Where a state court actually passes on the merits of a claim, the deliberate by-pass rule does not apply. *Warden, Md. Penit.* v. *Hayden,* 1967, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782.

Had the California District Court of Appeal refused to consider the merits of Respondent's claim with regard to the Fisk testimony the deliberate by-pass rule would be applicable. It did however consider said contention on its

merits but rejected it. In its discussion of the merits of said claim that court stated that it "would have no hesitancy in ordering a reversal," except for its conclusion that Respondent had not been prejudiced by Fisk's testimony. *People* v. *Miller, supra* at 738. Under these circumstances the deliberate by-pass rule is not available. *Warden* v. *Hayden, supra.*

II. THIS HONORABLE COURT, IN DISMISSING, PER CURIAM, RESPONDENT'S WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED, DID NOT ADJUDICATE THE MERITS OF HER CONSTITUTIONAL CLAIM SO AS TO BAR HER FROM SUBSEQUENT FEDERAL HABEAS CORPUS RELIEF.

28 U.S.C. §2244(c) provides that "a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner . . . shall be conclusive . . . as to all issues of fact or law . . . *actually adjudicated* by the Supreme Court" (Respondent's emphasis) when those issues are raised in a subsequent federal habeas corpus proceeding.

As the court below pointed out the Congressional intent in enacting §2244(c) was to give a conclusive presumption *only to actual adjudications* of the federal rights by the Supreme Court and not to give such a presumption to mere denials of writs of certiorari. S. Rep. No. 1797, 1966 U.S. Code Cong. & Adm. News, 3664.

This Honorable Court did not render a majority opinion in any way adjudicating Respondent's claim. Certainly such an adjudication was available to it after entertaining oral argument and its refusal to engage in meritorious comment was a deliberate decision attended by specific judicial consequence. This Honorable Court's dismissal of the writ as having been improvidently granted is indistinguishable from a denial of the original petition. Indeed,

the dissenting opinion of this Honorable Court opens with speculation as to which of three potential grounds served as the predicate for the majority's election not to consider the merits. Similarly, the petition is purely speculative as to the interpretation of this Court's dismissal of Respondent's writ as improvidently granted. This Honorable Court did not render an opinion as to the merits of Respondent's writ and therefore there was effectuated no stare decisis upon which to base a claim of res adjudicata.

III. Respondent Did Not Waive Her Federal Constitutional Claims by Failing to Renew Her Objection to the Fisk Testimony in the Presence of the Jury When Her Trial Counsel Did So Specifically Object Before the Court and Did Specifically Object to the Court's Ruling that Said Objection Must Be Renewed Before the Jury.

Petitioner contends that Respondent's defense counsel would have had to make his objection in the presence of the jury after Peggy Fisk had stated that she had been Respondent's cellmate, that Respondent had made statements to her, and that she had never advised Respondent of her constitutional rights. A sustained objection at that point could not fail to leave the jury with the erroneous impression that Respondent had confessed to the crime. No legitimate state interest is served by requiring, in the context of a case like this, that an objection be renewed in the presence of the jury after preliminary questioning. See *Jackson* v. *Denno*, 378 U.S. 368, 378-88 (1964).

In light of the unconstitutional choice to which Respondent's counsel was put, it cannot be argued that his decision not to object in the presence of the jury was a "strategic, tactical" or other decision "that can fairly be described as the deliberate by-passing of state procedures."

Fay v. *Noia,* 372 U.S. 391, 439 (1963). There is nothing in the record to support the view that he preferred to have Peggy Fisk's testimony admitted rather than excluded. Compare *Henry* v. *Mississippi,* 379 U.S. 443 (1965) at p. 451. Indeed, if this were the case it would be extremely difficult to explain why he voiced his objection before her testimony. The most that can be said is that he may have preferred to have Peggy's testimony admitted rather than object in the presence of the jury after the preliminary questions. Indeed this is precisely how Respondent's trial counsel explained, in his motion for a new trial, why he had not renewed his objection. See F. vol. II, 266.

Petitioner claims that:

> "Under California law counsel for Respondent could have requested that the trial court take evidence outside of the presence of the jury on the issue of whether the statements made by Respondent to the undercover agent were voluntary and were not obtained in violation of Respondent's right to counsel and against self-incrimination." (Petition, p. 43).

But this is precisely what defense counsel attempted to do at the on-the-record proceeding in chambers. He objected to Peggy's testimony, but the trial judge ruled that "we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time." (R. 1015) Respondent"s attorney disputed the judge's requirement that he must object in the presence of the jury, asserting: "You know that isn't right, Your Honor." But the Judge finally ruled that: "I don't see how it could be done *in the absence of the jury.*" (R. 1015, emphasis added) In light of this exchange, how can it be said that counsel for Respondent "made no

such request" for a determination outside the hearing of the jury? What more could counsel do other than argue with the judge's ruling or futilely repeat his request?

The instant case does not reflect a situation wherein defense counsel deliberately, as a matter of trial strategy, waived his constitutional objections to certain evidence, as in *Curry* v. *Wilson*, 405 F. 2d 110 (Ninth Cir. 1968) Respondent's trial counsel considered the Fisk testimony completely prejudicial and attempted to have it excluded by objecting thereto in chambers. His refusal to renew his objection in the presence of the jury, as the trial court insisted, was based upon his conviction that this might lead the jury to speculate that the excluding testimony was more incriminatory than it actually was. As the court below pointed out this insistence by the trial court was unreasonable and unconstitutional. It is the overriding duty of a federal court to protect federally guaranteed rights of an individual citizen, which duty impels the court to inquire into the reasonableness and constitutionality of state procedural rules. *Whiters* v. *Blakcom*, 333 F. 2d 496 (Fifth Cir. 1964).

Conclusion

For t. e foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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APPENDIX A

392 U.S. 616

LUCILLE MILLER, petitioner, v.
STATE OF CALIFORNIA.
No. 154, OCTOBER TERM, 1967.

On Writ of Certiorari to the District Court of Appeal of California, Fourth Appellate District.

Former decision, 389 U.S. 968, 88 S.Ct. 460; 389 U.S. 1028, 88 S.Ct. 761.

F. Lee Bailey, Boston, Mass., for petitioner.

Philip C. Griffin, Los Angeles, Cal., for respondent.

Facts and opinion, 245 Cal.App.2d 112, 53 Cal.Rptr. 720.

June 17, 1968. PER CURIAM. The writ of certiorari is dismissed as improvidently granted.

Mr. Justice MARSHALL, with whom THE CHIEF JUSTICE, Mr. Justice DOUGLAS, and Mr. Justice BRENNAN join, dissenting.

The Court may leave this judgment standing only upon one or more of the following grounds: that there was no constitutional error in petitioner's trial; that whether or not there was error, objection to it was waived; or that the error was harmless. None of those grounds are persuasive to me, and I would reverse.

The facts of the case are as follows. A short time after midnight on October 8, 1964, petitioner's husband was killed in the conflagration of the automobile in which he and petitioner had been riding. Later that day, at about 1:30 p. m., petitioner was arrested for murder, and was taken to a county jail, where she was booked on that charge and placed in a cell. She was met at the jail by a lawyer, a family friend who had been called by petitioner shortly after the fire. The night of her arrest petitioner spoke with a police officer for several hours at the jail, answer-

ing questions and reciting her version of what she claimed to have been an accidental fire.

In an attempt to prevent questioning of his client, petitioner's counsel set up, with his associates, a 24-hour-a-day watch of her cell. Thereafter, at about 11 p. m. on October 9, Peggy Fisk, an undercover agent in the employ of the county sheriff's office, was falsely booked into the jail on a fictitious narcotics charge and placed in petitioner's cell. Two other prisoners who had shared the cell were later removed. Fisk did not advise petitioner that she was an agent of the sheriff placed in the cell to report on anything petitioner might say. She remained alone with petitioner until October 15, giving oral reports as to their conversations from time to time to the sheriff's office; a written report was prepared on October 12 and partly on October 14.

On October 13, a complaint was filed formally charging petitioner with murder; petitioner was arraigned that day on the complaint.[1] An indictment was returned on October 20, and the complaint was then dismissed.

It was the State's theory at trial that petitioner did not love her husband; that she drugged him and then set the automobile on fire; and that she killed him in order to be free to marry one Arthwell Hayton and to collect some $100,000 in insurance proceeds. The defense theory was that the fire was of accidental, rather than incendiary, origin. The defense contended that although petitioner was in love with Hayton until her husband's death the affair between them had terminated several months earlier, petitioner had given up any thought of marrying Hayton, and had been reconciled with her husband; and that she would

[1] The judge on the same day issued an order prohibiting officials from questioning petitioner unless her attorney was present, and ordered her attorneys to cease sitting outside her cell. Apparently, the police did not inform the judge of Fisk's continued presence.

not be motivated to kill her husband for the insurance since he earned some $30,000 a year in his dental practice.

Fisk was called as a prosecution witness at trial and testified that petitioner told her in the cell after her arrest for murder that "she did not love her husband but she respected him"; that "she had always loved Mr. Hayton and still loves him"; that "she would receive over a hundred thousand dollars in insurance because of the accidental death"; and that "as soon as this mess was over, that she planned to take [her children] * * * away to Europe with the insurance money."

The district attorney relied upon and emphasized Fisk's testimony in his argument to the jury. See infra, at 2268-2269. After deliberating for more than three days, the jury returned a verdict that petitioner was guilty of murder in the first degree. She was later sentenced to life imprisonment.

I.

Although the issue is not free from difficulty, it seems to me the record clearly reveals petitioner adequately raised and preserved her federal constitutional objection to Fisk's testimony. That issue arises in the following context.

Toward the close of its case in chief, the prosecution called Fisk as a witness. Petitioner's trial counsel immediately objected, before Fisk was sworn, to her testimony at that time, on the ground that he had not been given her address prior to her testifying as he had been promised. There then occurred an extended conference in the judge's chambers.

In chambers, petitioner's counsel made two objections to Fisk's testimony. He first discussed the objection raised in the presence of the jury that he had not been given the witness' address as he had been promised, so that he might interview her. He then presented extensively the constitu-

tional objection to any testimony at all from Fisk, discussing the circumstances giving rise to the contention and citing the relevant cases.[2] The district attorney first explained why he had been unable to provide counsel with Fisk's address and acknowledged that he had forgotten the request, which was apparently based on the fact that defense counsel had been shown, a month or so earlier, a report of the sheriff concerning the witness in which she had been identified as "Jackie Doe." He attempted to distinguish the cases cited by petitioner's counsel, and elaborated somewhat on Fisk's activities.[3]

As to the first ground of objection, the trial judge said "in view of the circumstances related that Mr. Foley [defense counsel] was promised an opportunity to talk to this witness," Fisk should be withdrawn at that time. The district attorney agreed to withdraw her. The trial judge then turned to the constitutional ground of objection. It had been clearly disclosed at the conference that Fisk spent almost a week in petitioner's cell, without disclosing her identity, and would testify concerning statements made to her by petitioner. The district attorney said he would call her as a witness the next day and stated to the judge, as to petitioner's constitutional objection: "You would have to wait and listed to the voir dire on the stand and see." The following colloquy, concluding the in-chambers conference, ensued:

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[2] Counsel cited by name and discussed, as did the district attorney, Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1965). The latter decision, grounded on the Federal Constitution, encompasses a claim based on Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964).

[3] The district attorney represented that Fisk, although being with petitioner "for about a week," did not interrogate petitioner or in any way seek to elicit information from her. Although that representation was undoubtedly made in good faith at the time, it is conceded to be incorrect. See infra, at 2266.

"The Court: * * * [Y]ou will have the opportunity to talk to her but on the other objection, we would have to have her sworn and at least testify to the preliminary questions anyway, and have an objection made at the proper time.

"Mr. Foley: You know that isn't right, your Honor.

"The Court: Unless you want me to look at this [sheriff's] report and see what she knows. Does this report indicate?

"Mr. Turner [district attorney]: There has to be a foundation laid, an objection made. There is no way to—

"The Court: I think there would have to be. I don't see how that could be done *in the absence of the jury.*" (Emphasis added.)

The following day Fisk was called as a witness. The district attorney asked some preliminary questions. Fisk was identified as having been employed the previous October by the county sheriff as an undercover agent, and it was elicited that in the course of that employment she was assigned the task of pretending to be a prisoner in jail with petitioner, where she became acquainted and talked with her. When the district attorney asked Fisk if petitioner had discussed her "domestic problems with her husband," counsel for petitioner asked if he might "ask a question on voir dire." He elicited that Fisk had not identified herself as a police agent to petitioner, and had not advised petitioner she could have an attorney present when they talked. Direct examination was then resumed by the district attorney. Fisk then testified concerning petitioner's statements to her, see supra, at 2260.

On cross-examination, petitioner's counsel elicited answers concerning Fisk's being placed in petitioner's cell, reporting to the sheriff, and activities in the cell (see infra, at 2266). He also elicited that petitioner had told Fisk

the fire was accidental, and, in short, a story concerning her husband's death consistent with that which petitioner had related to the police at the scene and in questioning at the jail, and consistent with petitioner's claim of innocence.

In these circumstances respondent contends that it is "obvious" that petitioner's trial counsel, following his interview with Fisk, made a tactical judgment that her testimony would be helpful, and therefore that the federal claim is not available to petitioner here because it was waived. I find that view unacceptable.

The District Court of Appeal clearly agreed that petitioner's federal contention based on our decisions in *Massiah* and *Escobedo* was valid. 245 Cal.App.2d 112, 144, 53 Cal.Rptr. 720, 740. The court stated it did not reverse the conviction only because it viewed Fisk's testimony as nonprejudicial. Ibid. However, it went on to say that petitioner waived the point by failing to object when Fisk was called the day following the in-chambers conference, or, to put it another way, that "it is reasonable to assume that defense counsel was willing to have Peggy [Fisk] testify" in the circumstances. 245 Cal.App.2d, at 143, 53 Cal.Rptr., at 740.[4] I think it significant to note that the Supreme Court of California specifically disapproved the language of the District Court of Appeal in this case with respect to waiver of objections to admission of evidence obtained in violation of "*Escobedo-Dorado*" by a mere failure to object, see People v. Doherty, 67 Cal.2d 9, 14, 59 Cal.Rptr. 857, 860, 429 P.2d 177, 180 (1967), and in the same decision

[4] One factor recited by the court as leading it to conclude that petitioner's counsel desired Peggy Fisk's testimony was that he "received a copy of Peggy's reports to her superiors concerning her talks with defendant," and, apparently, was in a position to balance its advantages and disadvantages. 245 Cal.App.2d, at 143, 53 Cal.Rptr., at 740. The record does not reveal that sheriff's report, but it does show that counsel had seen it prior to objecting strenuously at the in-chambers conference to Fisk's testifying.

cast considerable doubt on the approach of the District Court of Appeal in this case toward presuming or assuming that the failure to object was a considered trial stratagem.[5]

In any event, this Court has long held that a waiver of a federal constitutional right is not lightly to be presumed. See, e. g., Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). In this case counsel clearly apprised the trial court of the basis of his objection, and indeed he cited the specific decisions that clearly supported the claim. Surely there was no bypassing of the state courts on the issue.

Concerning the failure to renew the objection, I note that the trial judge appears clearly to have required petitioner to raise the issue anew in front of the jury and after preliminary questions had been asked of Fisk. On this record those preliminary questions clearly identified her as having engaged in conversations with petitioner as an undercover agent in the jail pretending to be a fellow prisoner. As petitioner's trial counsel said in a motion for a new trial: "The defendant was then placed in the unfortunate position of being forced to object in front of the jury. If the objection were sustained, the jury might well * * * infer that through a technicality the defendant had managed to keep out of evidence a full confession."

Thus the most that can be said on this record is that trial counsel—having previously raised the objection—preferred to have Fisk's testimony admitted rather than objecting to it in the presence of the jury after Fisk had

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[5] In the *Doherty* case, the California Supreme Court said, in a situation where counsel might develop facts upon which an objection could be based but did not object (in relation to that court's *Dorado* decision), not that it would assume waiver of the point, but rather that "[i]f the People should sustain the burden of establishing the fact of such tactics, we would treat defendant's stratagem as a waiver of the objection." 67 Cal.2d, at 14, n. 4, 59 Cal.Rptr., at 860, 429 P.2d, at 180, n. 4.

been identified. Cf. Jackson v. Denno, 78 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); People v. Schader, 62 Cal.2d 716, 727-728, 44 Cal.Rptr. 193, 200, 401 P.2d 665, 672 (1965). Placing a defendant in that kind of a dilemma with respect to renewing a federal constitutional objection serves no valid purpose. Douglas v. State of Alabama, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). And while respondent indicates here that California law permits a defendant to object to the admission of evidence and establish a basis for the objection outside the presence of the jury (citing *Schader*, supra), that was neither the import of the trial judge's ruling in this case nor the view of the district attorney at this trial (see supra, at 2261-2262).

Since the record reveals the trial court and the prosecution were clearly apprised of the constitutional claim, since the state court at least alternatively passed upon the validity of that claim, and since it cannot be said on the record that the failure to renew the objection was anything more than a decision reflecting the trial judge's ruling that the objection be voiced before the jury, I should think it perfectly clear that the issue was adequately preserved.[6]

II.

Notwithstanding that respondent's own courts viewed Fisk's placement and activities in petitioner's cell as unconstitutional, respondent here attempts to defend the sheriff's action on two grounds, both of which are patently without substance.

Respondent contends that petitioner's constitutional rights were not violated, because Fisk was placed in the cell prior to any formal charge being filed against peti-

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[6] Cf. Fay v. Noia, 372 U.S. 391, 438-440, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Compare Henry v. State of Mississippi, 379, U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

tioner. To be sure, it is emphasized in Massiah v. United States, 377 U.S. 201, 204-206, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), that the defendant there had been indicted and that an indictment marks a point at which the formal adversary process begins. Thus, the Court held that statements obtained on behalf of the prosecution by a co-conspirator of the defendant during conversations in the former's automobile, violated the defendant's Sixth Amendment right to counsel[7] since he had been indicted and was already represented by counsel. At the same Term, the failure to honor the right to counsel was recognized at an earlier stage in respect to interrogations, namely, when, among other things, "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect. * * *" Escobedo v. State of Illinois, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). That language applies here. Petitioner had been arrested and booked for murder. Clearly, given the circumstances of the fire, if a crime had been committed, petitioner had done it. In practical effect the criminal proceedings had begun, for it is clear from the arrest, from petitioner's initial questioning, and from the decision to use Fisk that the sheriff's office had ceased merely a general inquiry into the cause of the fire.[8]

Indeed, in one respect at least, this is a clearer case than *Massiah:* unlike the defendant there, who had been released on bail, petitioner was in custody without bail, with a consequent lack of freedom to choose her companions. And petitioner, like the defendants in *Massiah* and *Escobedo,* was represented by counsel at all times. Moreover, a formal

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[7] At the same Term, Massiah was applied to vacate a state judgment affirming a conviction. McLeod v. Ohio, 378 U.S. 582, 84 S.Ct. 1922, 12 L.Ed.2d 1037 (1964). See also McLeod v. Ohio, 381 U.S. 356, 85 S.Ct. 1556, 14 L.Ed.2d 682 (1965).

[8] Cf. Hoffa v. United States, 385 U.S. 293, 309-310, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966).

complaint charging petitioner with murder was filed on October 13, and Fisk remained in petitioner's cell, eliciting information or conversing with petitioner until October 15.[9]

Both state courts, see, e. g., People v. Flores, 236 Cal.App.2d 807, 46 Cal.Rptr. 412 (1965), cert. denied, 384 U.S. 1010, 86 S.Ct. 1917, 16 L.Ed.2d 1017 (1966) (jail cell plant); People v. Ludlum, 236 Cal.App.2d 813, 46 Cal.Rptr. 375 (1965), and lower federal courts, see e. g., Clifton v. United States, 341 F.2d 649 (C.A. 5th Cir. 1965), have held that the right to counsel as interpreted in *Massiah* and *Escobedo* bars the admission of statements obtained at some preindictment point, at least when the accusatory stage has been reached and the police have clearly focused upon the subject.[10] However that stage be defined, it was clearly reached here.

Respondent also contends that petitioner's constitutional rights were not violated, because Fisk engaged in no "process of interrogations," Escobedo v. State of Illinois, 378 U.S. at 491, 84 S.Ct. 1758 designed to obtain a confession from petitioner, or that statements from her had not been "deliberately elicited," Massiah v. United States, 377 U.S., at 206, 84 S.Ct. 1199. In the State's view, so long as Fisk acted simply as a listening post, she could testify as to any statements made to her by petitioner. That view was, however, rejected in *Massiah* itself. The Government in that case pointed to the fact that the record did not reveal that its agent had induced the defendant by persuasion (there based on friendship) to discuss his activities, and urged that "providing a defendant an opportunity to talk"[11] did not violate his right to counsel. See also Beatty v. United

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[9] See n. 12, infra.

[10] Cf. People v. Robinson, 16 A.D.2d 184, 224 N.Y.S.2d 705 (4th Dept. 1962) (jail cell plant). See also Note, 79 Harv.L.Rev. 935, 1006 (1966).

[11] Brief for the United States, Massiah v. United States, No. 199, October Term, 1963, at 30.

States, 389 U.S. 45, 88 S.Ct. 234, 19 L.Ed.2d 48 (1967), reversing 377 F.2d 181 (C.A. 5th Cir.).

At all events, Fisk was not put in the cell to discuss the weather, to console petitioner, or merely to provide her with companionship. Her presence itself was an inducement to speak, and an inducement by a police agent. While petitioner's statements to her were not obtained by coercive means, they certainly were not given, in light of the deception, through a knowing and intelligent waiver of petitioner's rights.

Furthermore, it is clear on this record that Fisk was planted in petitioner's cell in order to subvert her right to counsel, with the express purpose of attempting to obtain evidence out of her mouth. On one occasion, Fisk was given a newspaper clipping concerning the case and was told to show it to petitioner, which she did with some accompanying statement, such as the press is "ruining you." On another occasion, pursuant to instructions, Fisk told petitioner of a conversation that she had supposedly overheard in a hall between four men whom she thought were from the district attorney's office, in which one of the men, as the ruse went, said: "Getting back to the Miller case, Arthwell Hayton came in and blew the top off the case." Fisk also told petitioner "I put all my trust in Mr. Bland [the sheriff] and maybe it would do some good for you if you tried the same." Finally, Fisk said that she had at one time been represented by an attorney who "did not do me much good" and indicated that perhaps petitioner should suspect hers.[12]

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[12] Respondent also argues that petitioner did not show that any of her statements as related by Fisk occurred prior to the filing of a formal charge on October 13, or were specifically prompted by the four incidents of deliberate inducements to speak related in the text above. Of course petitioner has no such burden in the circumstances of this case. Besides, petitioner's counsel asked Fisk, for example, "which day was it that she [petitioner] mentioned insurance money to you, 9th, 10th, 11th, 12th, 13th or 14th?"

Such deliberate police deception and subversion of a defendant's rights should not be condoned. The District Court of Appeal said in this case:

> "It is almost incredible that in these days of enlightened treatment by prosecution authorities of persons charged with crime, the Peggy Fisk incident could have occurred. * * *
>
> * * * * * * *
>
> "The trick attempted by the authorities in which they apparently hoped to obtain incriminating statements from defendant and to get her to throw herself on the alleged mercy of the sheriff and to suspect her own attorney was completely indefensible. * * *" (245 Cal.App.2d, at 141, 143-144, 53 Cal.Rptr., at 738, 740.[13])

I agree, and I would not leave standing a judgment reflecting such an egregious violation of *Massiah* and *Escobedo*.[14]

III.

Having concluded that petitioner properly preserved her federal constitutional objection to the admission of Fisk's testimony, and that its admission did indeed violate her constitutional rights, I turn to respondent's contention that the error was "harmless beyond a reasonable doubt," Chapman v. State of California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Chapman* was decided after the decision of the California District Court of Appeal now

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Fisk was unable to answer. Moreover, assuming all the statements were made on the first day of Fisk's deceptive presence in the cell, I would reach the same result.

[13] In addition to the other cited cases (see supra, at 2265) in which the admission of testimony by jail cell undercover agents was held to be unconstitutional, see People v. Arguello, 63 Cal.2d 566, 47 Cal.Rptr. 485, 407 P.2d 661 (1965).

[14] Petitioner's trial, which began on January 11, 1965, was prior to the effective date of Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and therefore that decision is not applicable. See Johnson v. State of New Jersey, 384 U.S. 719, 734, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966).

on review here, and normally a remand would be in order so that the state court might reconsider, in light of that case, its conclusion that the error was harmless. However, since a majority of the Court refuses to decide this case at all, I wish to point out why I cannot regard the error as harmless.

I have already indicated generally the theories of the prosecution and defense as to Dr. Miller's death (see supra, at 2259-2260). The evidence against petitioner was circumstantial.[15] So saying, I do not imply it was necessarily in any sense weak; that fact does, however, help to indicate why the issue of motive was particularly crucial, and one which was central to the trial. Fisk's testimony definitely supported the State's case on that issue. Petitioner testified that she loved Hayton until " the minute that Cork [Dr. Miller] was gone," but that she had given up any idea of marrying Hayton as of the time of an incident that occurred approximately three months prior to her husband's death. As to that testimony, the district attorney argued to the jury:

> "But that's not what she told the girl [Fisk] up in jail. She told the girl up in jail that she still loved Hayton, felt that he would come to her."

On rebuttal argument, the district attorney again emphasized Fisk's testimony:

> "He [defense counsel] says the prosecution's case is based entirely on surmise and conjecture. That's not true.
>
> * * * * * *
>
> "Is it surmise and conjecture that Mrs. Miller had been infatuated with Hayton and wanted to marry him?
>
> "There is disagreement as to when this wanting to

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[15] See Fontaine v. State of California, 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154; cf. Anderson v. Nelson, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81.

marry him stopped, but there is no question at all that she wanted to marry him.

* * * * * *

"Is it surmise and conjecture that she told the girl up in jail she still loved Hayton and did not love her husband?

* * * * * *

"And, of course, right after her husband's death she is arrested and is in custody, and she tells the girl upstairs that she still loves Hayton."

To be sure, for almost each point upon which Fisk's testimony was emphasized there was other supporting evidence. But this Court has always viewed evidence out of a defendant's own mouth obtained after the events, as particularly weighty with the jury. See Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). And, as the quotations above indicate, that was plainly the view of the district attorney in this case. Certainly Fisk's testimony, if believed, made the prosecution's case much more credible, and undermined petitioner's defense.

Moreover, the jury deliberated three days before reaching a verdict. It may have spent that time assessing the expert testimony in regard to the causes of fires in automobiles, weighing the prosecution's experts' testimony that this fire was of incendiary origin against the testimony of an expert for the defense, who said the fire might well have been accidental. It may have found all that time necessary to resolve the question of guilt or innocence. Or, since it was charged on both first- and second-degree murder, it might have spent that time weighing not guilt and innocence but degree of guilt, even though only the former would have been consistent with the prosecution's theory. Fisk's Testimony may have been particularly important with respect to the jury's resolution of that matter.

While of course one cannot know definitely what occupied the jury's time during the three days it deliberated, I am convinced it caniot be said "beyond a reasonable doubt," Chapman v. State of California, supra, that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction." Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). I would therefore reverse petitioner's conviction.